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 Appeal No. 87–1414 and 88–1213

U.S. Court of International Trade
 Slip Op. 88–106 Through 88–115

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87-1414)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE *v.* UTEX INTERNATIONAL INC., DEFENDANT, AND SENTRY INSURANCE CO., DEFENDANT-APPELLANT

Barbara M. Epstein, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for plaintiff-appellee. With her on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

William E. Melahn, Follick & Bessich, of Boston, Massachusetts, argued for defendant-appellant. With him on the brief was *Angela Violin*.

Appealed from: U.S. Court of International Trade.

Judge TSOUCALAS.

(Decided September 8, 1988)

Before FRIEDMAN, DAVIS,* and NEWMAN, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

In this action on a surety bond brought under 28 U.S.C. § 1582(2), Sentry Insurance Company appeals the judgment of the United States Court of International Trade, awarding liquidated damages to the United States in the amount of $11,718. [1] We reverse.

BACKGROUND

Utex International Inc. ("Utex") imported from India, through the Port of New York, 115 cartons of frozen shrimp. On February 1, 1980 the goods were released to Utex on the posting by Sentry Insurance Company ("Sentry") of a Single Entry Immediate Delivery and Consumption Entry Bond.

The Customs Service provided samples to the Food and Drug Administration ("FDA"). On February 6, 1980, a "Notice of Detention and Hearing" was issued to Utex by the FDA, copy to the Customs Service, stating that "the merchandise must be held intact pending final decision as to whether it shall be admitted or refused admission." The Notice also bore the statement: "The article is violative

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* Judge Davis, who died on June 19, 1988, took no part in this decision.

[1] *United States* v. *Utex Int'l Inc.*, 659 F. Supp. 250 Ct. Int'l Trade 1987).

within the meaning of 801(a)(3) [of the Food, Drug and Cosmetics Act of 1938 as amended, 21 U.S.C. § 381(a) (3)] in that it appears to contain Salmonella, and/or filth, and/or appears to be decomposed."[2]

Despite this Notice, the entry was liquidated by the Customs Service on February 29, 1980. The entry was not reliquidated.

On March 12, 1980 the Customs Service issued to Utex a "Notice of Refusal of Admission", which stated that the goods were in violation of Section 801(a)(3) and required Utex to export the shrimp under Customs' supervision within 90 days. Utex did not comply. On December 9, 1980 Customs sent Utex, with a copy to Sentry, a "Notice of Penalty or Liquidated Damages Incurred and Demand for Payment." The sum was not paid.

On June 27, 1984 Customs demanded payment of liquidated damages from Utex and/or Sentry, and on June 5, 1986 the government filed suit against both Utex and Sentry. Utex made no answer or appearance. Sentry was held liable on the entry bond, and takes this appeal.

The controlling question of law is whether the final liquidation of the goods discharged the surety from liability on the entry bond.

A. Liquidation

19 U.S.C. § 1514(a) provides that all administrative decisions as to value, classification, duty, exclusion, liquidation, etc., including the legality of all orders and findings entering into such decisions, are "final and conclusive upon all persons (including the United States and any officer thereof)" unless the decision is timely protested. Sentry asserts that these decisions are subsumed in the final liquidation and that, because the goods were neither reliquidated nor a protest filed, the government as well as the surety are bound thereby.

The Court of International Trade held that liquidation and reliquidation relate only to the computation and imposition of duties, and thus that the finality expressed in § 1514(a) does not apply to decisions on admissibility. *Utex*, 659 F. Supp. at 252. The court cites in support *United States* v. *American Motorists Insurance Co.*, 10 CIT ——, Slip op. 86–7 (1986), wherein the surety was held liable for payment of customs duties when the importer's checks were dishonored, despite intervening liquidation. The issues are not at all comparable, for the obligation to pay the duties owed had vested, and the only question was that of the dishonored checks. 19 U.S.C. § 1648; 19 CFR § 141.1(b). This decision sheds no light on the issues raised herein—other than to point up the absence of authority for the court's holding that liquidation is unrelated to admissibility.

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[2] The FDA apparently had promptly ascertained that frozen shrimp from India was "blocklisted". According to *Seabrook International Foods, Inc.* v. *Harris*, 501 F. Supp. 1086, 1088 (D.D.C. 1980), *aff'd sub nom. Continental Seafoods, Inc.* v. *Schweiker*, 674 F.2d 38 (D.C. Cir. 1982), "blocklisted" goods are "automatically detained".

It is long-standing customs law that when goods are finally liquidated they are deemed admissible, as summarized in R. Sturm, *Customs Law & Administration* § 8.3 *Finality of Liquidation* at 32, (3d ed. 1982), discussing 19 U.S.C. § 1514(a):

> All findings involved in a district director's decision merge in the liquidation. It is the liquidation which is final and subject to protest, not the preliminary findings or decisions of customs officers. *Commonwealth Oil Refining Co., Inc.* v. *United States*, 67 Cust. Ct. 155, C.D. 4267, 332 F. Supp. 203 (1971) and cases cited; *Dart Export Corp.* v. *United States*, 43 CCPA 64, C.A.D. 610 (1956), *cert. denied*, 352 U.S. 824, 88 S. Ct. 33, 1 L. Ed. 2d 48 (1956).

In harmony with the finality of liquidation, the customs regulations require that liquidation be suspended when the goods are food, drugs, and other articles subject to FDA inspection:

> 19 CFR § 159.55 Possible prohibited food, drugs, or other articles.
>
> (a) *Suspension of liquidation.* The liquidation * * * shall be suspended until it is determined whether admission of the merchandise into the United States is permitted under the law.

Other regulations require that Customs demand the return of inadmissible goods that had been released from Customs custody, and that such demand be made before liquidation has become final. 19 CFR § 141.113(b):

> If at any time after entry the district director finds that any merchandise contained in an importation is not entitled to admission into the commerce of the United States for any reason not enumerated in paragraph (a) of this section [relating to marking of certain merchandise], he shall promptly demand the return to Customs custody of any such merchandise which has been released.

19 CFR § 114.113(f):

> A demand for the return of merchandise to Customs custody shall not be made after the liquidation of the entry covering such merchandise has become final.

It is undisputed that Customs' liquidation on February 29, 1980 of Utex's 115 cartons of frozen shrimp was in violation of these regulations. These requirements enable Customs to implement a FDA refusal of admittance while the goods are still under detention by the importer and while they are subject to Customs' authority. The government's argument that the purpose of these regulations is simply to save Customs the bother of assessing duties and later making a refund, and not in recognition of any legally significant finality of liquidation, is contrary to the body of customs law.

The government itself calls the liquidation of Utex' shrimp "premature", using the word of the Court of Customs and Patent Appeals in *United States* v. *A.N. Deringer*, 593 F.2d 1015, 1020 (CCPA

1979). The situation in *Deringer* was, in pertinent part, similar to that at bar. In appeal No. 78–8 in *Deringer* the foods were liquidated a few days before issuance by Customs of a Notice of Refusal of Admission based on FDA inspection. The Court of Customs and Patent Appeals held that the liquidation did not conform to the regulation (the predecessor of 19 CFR § 159.55(a)) that requires suspension of liquidation until admissibility is determined, because the liquidation preceded the statutory notice of refusal required by 21 U.S.C. § 381(a). *Id.* at 1019. However, the appellate court rejected the holding of the Customs Court that the liquidation was void *ab initio*, and held that neither the legality nor the correctness of the liquidation could be disturbed because it had not been challenged by appropriate and timely procedure. *Id.* at 1020. The court held that absent timely protest as required by 28 U.S.C. § 1582(c), or reliquidation in accordance with statute and regulation, the matter should have been dismissed by the Customs Court for lack of jurisdiction. *Id.* at 1021.

A similar ruling was made by this court in *Omni U.S.A., Inc.*, v. *United States*, 840 F.2d 912, —— Fed. Cir. (T) —— (Fed. Cir. 1988). The Customs Service, in an admitted error, liquidated an entry at an incorrectly high duty, although it was required to have held the liquidation in suspense. This court held that the error could be corrected only within the terms of the statute, and that:

> Since nobody brought the errors to the attention of the appropriate customs officers within a year of the date of liquidation, authority to correct them lapsed according to the term of section 1520(c)(1) * * *.

Id. at 914, —— Fed. Cir. (T) at ——. This court rejected the proposition that the liquidation, since *ultra vires*, was void, stating "our want of enthusiasm for the void liquidations doctrine matches that of the *Deringer* court", and concluded that upon expiration of the time prescribed in the statute to correct errors, "jurisdiction to effect correction under that statute had lapsed." *Id.* at 915, 916, —— Fed. Cir. (T) at ——, ——.

Both the *Omni* and *Deringer* courts held that the erroneous liquidation could be corrected only by following the statutory procedures, and that failure to do so within the period set by statute leaves the liquidation final. *See also, e.g., National Corn Growers Ass'n.* v. *Baker*, 840 F.2d 1547, —— Fed. Cir. (T) —— (1988); *United States* v. *Uniroyal, Inc.*, 687 F.2d 467 (CCPA 1982). These decisions carried forward the established law that the statutory procedures of liquidation, reliquidation, and timely protest control the finality of the importation process.

We need not discuss what remedial action may have been available to the Customs Service, for it essayed none at all. There was no voluntary reliquidation within ninety days in accordance with 19 U.S.C. § 1501, no protest filed under 19 U.S.C. § 1514 or § 1516 (dur-

ing which the government might have raised the question of finality), no reliquidation within one year to correct clerical error, mistake, or inadvertence under 19 U.S.C. § 1520(c)(1), or within two years on account of fraud under 19 U.S.C. 1521. The liquidation was final.

The principal government argument, and basis for the decision of the Court of International Trade, is that the exclusion of food based on FDA determination of inadmissibility is not an exclusion under the customs law, 19 U.S.C. § 1514(a)(4), and thus that it is immaterial that the entry was finally liquidated by Customs for that was an act under the customs law. On this basis the trial court held that the finality of liquidation does not bar recovery of damages for the failure of Utex to reexport the shrimp upon receipt of the Notice of Refusal of Admission after liquidation. The court stated that to hold otherwise "would mean that Customs determines that food is contaminated and orders its exportation, which is clearly erroneous." *Utex*, 659 F. Supp. at 253.

We agree that the Customs Service has no authority over the correctness of the FDA's analysis of the shrimp; but the correctness of the decision to deny admission is not at issue. The long history of activity and jurisprudence in this area[3] shows that it is Customs' responsibility to carry out the FDA decisions, in accordance with customs law and regulation. The various statutes and regulations make clear that Customs is the enforcement arm of the process wherein admissibility is determined by the FDA. It is the Customs Service that is responsible for liquidation, and for suspension of liquidation pending determination of admissibility by the FDA. If it were intended that the FDA be excluded from the statement in 19 U.S.C. § 1514 that Customs' decision of liquidation "shall be final and conclusive upon all persons (including the United States and any officer thereof)" unless timely protested, plain language would be required to achieve such an exclusion. There is no authority supporting such an intended meaning, and no suggestion that Congress intended to change or dilute the classic finality of importation decisions.

We express grave concern that Customs' erroneous liquidation of the entry, in violation of law and regulation, defeated the legislative purpose of protecting the consumer by assuring reexportation or destruction of contaminated foods. The record before us does not reveal the ultimate disposition of the shrimp, although it suggests that Utex did not place the shrimp into commerce. The United States states in its brief that: "To urge that the proper consequence of a premature duty assessment by Customs is to permit the release of tainted food into the commerce of the United States defies common sense, in that release would clearly be hazardous to the public health and welfare." We totally agree. The public obligation that

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[3] The Customs Service has been charges with implementation of import exclusion laws of adulterated foods since 1848. See the historical summary in Customs Ruling 86-21, 20 Cust. Bull. No. 33, pp. 21–34, at 22–27 (Aug. 20, 1986); supplemented by General Notice, 21 Cust. Bull. No. 4, pp. 13–14 (Jan. 28, 1987).

Congress entrusted to FDA and the Customs Service was not fulfilled. The governmental error can not be condoned. However, this surety did not insure against governmental error.

In this suit against a surety on its entry bond, the surety's liability arises under and is in terms of the customs law. As observed in *Deringer*, 593 F.2d at 1020, both the legality and correctness of a liquidation are determined, at least initially, through the protest procedure, and "any challenge to the propriety of a liquidation [not specifically excepted] must be through this statute." *See, e.g., Guy B. Barham Co.* v. *United States*, 35 CCPA 138, 141 (1948) (attempted reliquidation by government, due to governmental error, void *ab initio* because untimely); *John S. Phipps* v. *United States*, 22 CCPA 595, 602, T.D. 47601 (1935) (although the appraisement may have been illegal, the government could not cancel or reliquidate the liquidation after the time set by statute); *Gallagher & Ascher* v. *United States*, 21 CCPA 313 (1933) (even if the liquidation were illegal, it became final absent protest); *see also Hambro Automotive Corp.* v. *United States*, 603 F.2d 850, 853 (CCPA 1979) (refusals to reliquidate final absent timely protest); *United States* v. *Nils A. Boe*, 543 F.2d 151, 156 (CCPA 1976) (refusing to permit protest to classification prior to liquidation).

We do not hold that the liquidation was correct. But absent timely reliquidation or protest it was final as to all aspects of the entry. The importer, the surety, and the government are bound by and have the right to rely on the finality of liquidation. Sentry's liability on the bond was thus discharged when the entry was finally liquidated.

B. The Entry Bond

The government argues that paragraph 7 of the entry bond contractually established the surety's liability independent of the finality of liquidation.

The provisions of the bond that are specifically directed to inadmissible goods are paragraphs 4 and 7. Paragraph 4 requires redelivery, on demand by the Customs Service, of goods that are found not admissible, and the payment of liquidated damages if such redelivery is not made. By regulation, 19 CFR § 114.113(f) quoted *supra*, no such demand shall be made after liquidation of the entry has become final; and apparently in this case no formal demand for redelivery was made, *see* 19 CFR § 141.113(e) (requiring that such demand be made on Customs Form 4647 or by letter). The government does not dispute that there is no liability under paragraph 4 of the bond.

Paragraph 7 provides:

> 7. And if in the case of any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States, and the above-bounden principal *after proper notice* shall mark, label, clean, fumigate,

> destroy, export, and do any and all other things in relation to said merchandise that may be lawfully required, and shall hold the said merchandise for inspection and examination * * * ; or in default thereof, shall pay to the director of customs as liquidated damages * * * [emphasis added]

Sentry emphasizes the "proper notice" requirement of paragraph 7, and argues that this paragraph is subject to the notice requirements and safeguards of 19 CFR § 141.113. Sentry states that the purpose of paragraph 7 is to require the importer to comply with lawful requirements to bring the merchandise into compliance or to export or destroy the goods, as appropriate; but that it does not effect a release of the government from the governing regulations.

The government argues that since paragraph 7 does not state that there must be a demand for redelivery and that the demand must be "in accordance with the law and regulations in effect", as paragraph 4 states, then no such constraint bars liability of the importer and the surety under paragraph 7. Such reading of the entry bond does not accord with the simple rule that the provisions of a contract will be read as a whole, absent clear expression of contrary contractual intent. *Restatement, Second, Contracts* § 202(2) ("A writing is interpreted as a whole"); 4 S. Williston, *A Treatise on the Law of Contracts* § 601 (W. Jaeger 3d ed. 1961).

The provisions of this entry bond are not easily strained into a reading whereby paragraph 7, directed to actions to be taken after goods have been found to be inadmissible, is read as excepted from the statutory and contractual notice requirements and controls. Both paragraphs 4 and 7 deal with inadmissible goods, and both are subject to the customs law and regulations they implement. The bond can not be interpreted contrary to law and regulations. *See United States* v. *DeVisser,* 10 F. 642 (S.D.N.Y. 1882) (customs bond must be interpreted in reference to applicable statutes and regulations), *cited with approval in Old Republic Insurance Co.* v. *United States,* 645 F. Supp. 943, 953 (Ct. Int'l Trade 1986). Any purported exception to the plain reading of the bond, and the law, must be clear and unambiguous.

We conclude that paragraph 7 does not establish absolute liability, free of the statute and regulations. Paragraph 7 twice uses the term "after proper notice"; the provisions of 19 CFR § 114.113 plainly apply to the entry bond, and a notice that violates 19 CFR § 114.113 can not be "proper notice". Thus we hold that paragraph 7 does not override and establish liability despite the final liquidation.

C. Protest

The government argues that in order for Sentry to have preserved the right to contest the government's demand for liquidated damages, Sentry was required to file a protest within 90 days after the demand, pay the full amount demanded, and sue for refund.

The Court of International Trade agreed, albeit somewhat ambiguously, for the court also decided the substantive questions of liability.

19 U.S.C. § 1514(c)(2) requires that a "protest of a decision, order, or finding described in subsection (a)" shall be filed within 90 days after the date of demand for payment against a surety bond. Subsection (a) lists the following:

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges of exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title.

Sentry argues that a demand for damages for failure to re-export is not a "decision, order, or finding," and thus that damages are not a "charge or exaction of whatever character", § 1514(a)(3). Sentry argues that the charges and exactions comprehended in § 1514(a)(3) are the payments required to be made in implementation of § 1514(a), but do not extend to damages for breach. Support arises in the fact that "liquidated duties, charges, or exactions", but not "liquidated damages", are named in 28 U.S.C. § 2637(a) as required to be paid before contesting the denial of a protest.

In the case at bar the demand for damages was made four years after final liquidation. The government argues that Sentry is barred from contesting the demand before the Court of International Trade or on this appeal, having failed to file a protest and pay the full amount demanded in advance. Mindful of the basic principle that forfeitures are not favored, *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U.S. (6 Otto) 234, 242 (1877), the government's view that would bar the surety from any defense would require clearer statutory support than we discern in 19 U.S.C. § 1514 and 28 U.S.C. § 2637. These provisions relate to th exhaustion of administrative remedies with respect to liquidation of the entry, as a prerequisite to judicial review of any of the items subsumed in liquidation. *See* 1 P. Feller, *U.S. Customs and International Trade Guide* § 4.03[1] 1981 (footnote omitted): "Once the administrative decision represented by a liquidation is made, the importer must file such a protest in order to secure further administrative review, as well as to preserve his right to judicial review". However, the issue at bar does not relate to ad-

ministrative review of liquidation, brought by the importer or surety, for the time for such review is long past.

We observe first that the Customs Form 5955 that was issued to Utex in 1980, entitled "Notice of Penalty or Liquidated Damages Incurred and Demand for Payment", does not mention an obligation to file a protest, although it does advise that the offender has 60 days in which to file a petition for mitigation under 19 U.S.C. § 1618. Failing payment, according to the form, the matter will be referred to the United States Attorney for collection. (The record does not show what form, if any, was issued in 1984.) In *W. X. Huber* v. *United States*, 29 Cust. Ct. 92, 99–101, C.D. 1451 (1952), *rev'd on other grounds*, 41 CCPA 69, C.A.D. 531 (1953), the Customs Court held that when demand for return of merchandise was not timely as required by customs regulations, the importer had the right to elect to pay the liquidated damages under protest and sue in the Customs Court, or wait to be sued in the district court; the court distinguished *United States* v. *Daniel F. Young, Inc.*, 78 Tres. Dec. 123, T.D. 50745 (1942), which held that suit on a surety bond, upon refusal to redeliver, could be brought only in the district court.

Sentry states, without contravention, that protest and advance payment of liquidated damages were not required of defendants in a district court action for damages, prior to enactment of the Customs Courts Act of 1980, which transferred jurisdiction of actions on a surety bond from the district courts to the Court of International Trade, 28 U.S.C. § 1582. There is no suggestion in the legislative history that Congress intended to change the status of the surety in such suits. Indeed, Sentry points out that the Customs Courts Act of 1980 contained a new provision, 28 U.S.C. § 1583, that authorized sureties to implead third parties or file cross-claims in actions on a bond brought under 28 U.S.C. § 1582, an opportunity that is not readily harmonized with the government's position that the surety must pay all claimed damages in full before raising any defense.

It is not characteristic of either the law of surety or the law of contracts that a defendant must routinely pay the amount demanded prior to judicial determination of contractual liability. Absent statutory directive or clear Congressional intent to the contrary, we do not impose it. The cases cited by the government referring to finality of assessment absent a timely protest all refer to duties and related exactions subsumed in final liquidation. We entirely agree, see Part A *supra*, that both sides to this action are now barred from challenging the liquidation. But in a suit for damages brought by the government, it appears clear that historically the surety was not required to file a protest and pay the full demanded damages in advance, in order to preserve its right to defend on the issue of liability.

We conclude that the 1980 legislative enactments did not change the right of the surety to defend against a claim for liquidated damages. Under the circumstances that here prevail the surety was not required to file an administrative protest and pay the damages assessed, as prerequisites to defending against the charge.

REVERSED

(Appeal No. 88–1213)

CHANNEL MASTER, DIV. OF AVNET, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Richard C. King, Fitch, King and Caffentzis, of New York, New York, argued for plaintiff-appellant.

Saul Davis, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With him on the brief were *John R. Bolton*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.

Chief Judge RE.

(Decided September 12, 1988)

Before NIES, NEWMAN and MICHEL, *Circuit Judges*.

MICHEL, *Circuit Judge*.

Channel Master, Div. of Avnet, Inc., appeals the judgment of the United States Court of International Trade, 648 F. Supp. 10 (Ct. Int'l Trade 1986) (Re, Chief Judge), upholding the classification by the United States Customs Service of Channel Master's imported merchandise as "other solid state (tubeless) radio receivers" under items 685.23 or 685.24 of the Tariff Schedules of the United States. We affirm.

BACKGROUND

This case concerns three types of solid state "scanners" imported from Japan by the appellant during the years 1974 through 1977. Each type of scanner is designed, upon insertion of one or more crystals, to receive radio frequencies corresponding to the inserted crystals. However, the scanners are not exported with crystals. Instead, the crystals are inserted into the scanners by eventual purchasers after importation. Crystals are inserted into a scanner by removing the back panel of the scanner and placing the crystals in an empty space designed for their receipt.

Channel Master's scanners were classified by the Customs Service under the Tariff Schedules of the United States as "other solid-state (tubeless) radio receivers," dutiable at a rate of 10.4 percent of their value. In an action it filed in the Court of International Trade contesting denial of a protest, Channel Master objected to the "radio receiver" classification and asserted that, since its scanners, as imported, lacked crystals, the merchandise properly should have been classified as "parts of radio receivers" or "other radio broadcasting reception apparatus," under the Schedules, dutiable at a rate of 6 percent of their value. In response, the government argued that Channel Master's scanners were at least "unfinished" radio receivers and, therefore, correctly classified as radio receivers in keeping with the applicable rule of interpretation for the Tariff Schedules, 19 U.S.C. § 1202 General Headnotes and Rules of Interpretation 10(h) (1982), which states that:

> unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished.

The Court of International Trade, relying upon *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States*, 600 F.2d 799 (CCPA 1979), binding precedent of one of our predecessor courts, held that assembled portions of an article indeed may be classified as the article itself when the imported assembly, although lacking "essential" parts, constitutes a "substantially complete article." The Court of International Trade further held that Channel Master's scanners are substantially complete radio receivers which, with the addition of the crystals, perform the basic functions of radio receivers, namely, selection, amplification, and detection. Accordingly, the Court of International Trade determined that the scanners had been properly classified and dismissed Channel Master's action. We are in agreement with the court's basic analysis.

OPINION

On appeal, Channel Master attacks the Court of International Trade's legal conclusion that imported assemblies which constitute a "substantially complete article" but which lack one or more "essential" parts nonetheless may be classified as the unfinished article. According to Channel Master, since its scanners, as imported, cannot perform the basic functions of radio receivers, and could do so only with the insertion of the crystals, the imported scanners cannot be radio receivers or classified as such. We disagree.

As the Court of International Trade pointed out, the *Daisy-Heddon* case clearly established that the test to be applied is not solely whether an omitted part is "essential," but whether Channel Master's assembled pieces result in a "substantially complete" article. Channel Master argued essentially that the crystals have unique functional significance and, therefore, are indisputably "essential." But the *Daisy-Heddon* court specifically stated that it is

improper for an importer to have "seized" on the word "essential" and to have ignored other factors indicative of whether an article is substantially complete. 600 F.2d at 802; *see also Swift Instruments, Inc.* v. *United States*, 554 F. Supp. 1235, 1237–38 (Ct. Int'l Trade 1982), *aff'd*, 714 F.2d, 161 (Fed. Cir. 1983).

The court in *Daisy-Heddon* further stated that, in addition to the relative significance of an omitted part, other possibly relevant factors include: (1) comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; and (4) trade customs, i.e., whether the trade recognize the importation as an unfinished article or as merely a part of that article. 600 F.2d at 803. This multifactor test avoids a rigid approach that may be inappropriate to a given case, *id.*, and specifically avoids compelling an outcome, as might otherwise result, whereby simply delaying the insertion of just one or a few parts until after importation causes an imported device to be designated as "parts" rather than as the unfinished article. The opportunities in the latter circumstance for bad faith circumventing of the Customs law would be legion. Accordingly, in view of the rule of law clearly set forth in *Daisy-Heddon*, we reject Channel Master's argument that it is the significance of the omitted crystals alone which should be dispositive in this case.

We also conclude that there is no error in the Court of International Trade's application of the law to undisputed facts in this case. The stipulated facts disclose that two of the Channel Master scanners have over 135 parts and are fully operational with the addition of just four crystals and four small batteries. The other scanner at issue has over 175 parts and requires the addition of just ten crystals to be fully operational. Accordingly, as to the first of the "other" factors recited in *Daisy-Heddon*, there is a clear indication that the scanners, as imported, as substantially complete radio receivers.

No dispute exists respecting the relatively quick, simple, and costless steps required for untrained consumers to insert the crystals into the scanners. Therefore, with regard to time and effort for completing the articles as compared to the time and effort required to place the articles in their imported condition, the undisputed facts once again support the Court of International Trade's determination that Channel Master's scanners are substantially complete.

The evidence also showed that the cost of the omitted parts comprised 14 percent, 16 percent, and 23 percent of the three different scanner models, respectively. The Court of International Trade acknowledged that these percentages were not insignificant, but found them relatively small and sufficiently low to support the conclusion that the scanners are substantially complete. We cannot disagree.

Based on these determinations, and notwithstanding the unique functional significance of the crystals, we are of the view that the Court of International Trade correctly concluded that Channel Master's scanners were properly classified and properly charged at the higher rate, and thus that the Court of International Trade correctly dismissed Channel Master's action. Moreover, as the Court of International Trade observed, a presumption of correctness attaches to the government's classification and it is the importer's burden to overcome this presumption. *See Jarvis Clark Co.* v. *United States*, 739 F.2d 628, 630 (Fed. Cir. 1984); *United States* v. *A. Johnson & Co., Inc.*, 588 F.2d 297, 300, 301 (CCPA 1978); *Hayes-Sammons Chemical Co.* v. *United States*, 55 CCPA 69, 72 (1968). Based on the totality of the circumstances in this case, we agree Channel Master simply has not carried its burden.

Conclusion

Accordingly, the judgment of the Court of International Trade dismissing the action is affirmed.

AFFIRMED

[illegible]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88-106)

RHONE POULENC, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-10-01360, etc.

Before DICARLO, *Judge.*

Rule 60(b) of the Court of International Trade cannot expand the statutory 30 day limit for retrial or rehearing. The Court lacks jurisdiction to set aside orders of dismissal for lack of prosecution where the motion was filed beyond the 30 day limit under 28 U.S.C. § 2646 (1982).

[Motion to vacate judgments of dismissal denied.]

(Decided August 15, 1988)

Donohue and Donohue (*James A. Geraghty*) for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, United States Department of Justice (*Mark S. Sochaczewsky*) for defendant.

DICARLO, *Judge:* Rhone Poulenc, Inc. (plaintiff) moves pursuant to 28 U.S.C. §§ 1585 and 2643(c)(1) (1982) and Rules 60(b) and 82(b) of the Rules of this Court to set aside judgments of dismissal for lack of prosecution and restore twelve actions to the Court's suspension disposition calender. The Court finds that the motion is beyond the 30 day limit of 28 U.S.C. § 2646 (1982) and must be denied for lack of jurisdiction.

BACKGROUND

Synthetic silica was found to be classifiable duty free under item 523.11 of the Tariff Schedules of the United States in the test case of *Rhone Poulenc, Inc.* v. *United States,* 11 CIT ——, Slip Op. 87-75 (June 26, 1987). Twelve cases had been placed on the suspension disposition calender pending the final determination of that test case. Pursuant to Rule 85(b) of the Rules of this Court, the Clerk of the Court mailed notices, after the time to appeal had expired, informing the parties that the suspended actions would be dismissed unless removed from the suspension disposition calender before April 30, 1988. Plaintiff acknowledges receiving the notice on October 30, 1987, but avers that the attorney handling these cases had just

learned his father was dying and, contrary to his usual practice, did not note the April removal date. *Plaintiff's Memorandum in Support of Motion to Set Aside Dismissal Orders,* at 7 and exhibit 7.

Plaintiff's counsel prepared proposed stipulations for the suspended actions and submitted them to defendant's counsel on November 25, 1987. *Id.* at 5 and exhibit 1. Defendant revised the stipulations and returned them on December 15, 1987. *Id.* at 5 and exhibit 2. In accordance with Rule 80 of the Rules of this Court, defendant asked the clerk on February 1, 1988 to return the entry documents to the involved ports for review and marking, a customary procedure in processing stipulations. *Id.* at 5 and exhibit 3. The clerk complied and asked; Customs to respond within 30 days. *Id.* at 5 and exhibit 4. Follow-up notices were sent when Customs failed to respond within the 30 day period. *Id.* at 5 and exhibit 5.

The actions were not removed from the suspension disposition calender under any of the procedures available under Rule 85(c), and on May 6, 1988 the Clerk of the Court entered Rule 85(d) orders dismissing the twelve actions for lack of prosecution.

Plaintiff provides additional details that throughout the stipulation process, counsel for the parties conferred by telephone but never mentioned the suspension removal date, and that plaintiff received the first confirmed stipulation for Case No. 85–11–01643 in "late May, 1988." *Plaintiff's Memorandum in Support of Motion to Set Aside Dismissal Orders,* at 6. Plaintiff states it never received dismissal notices, and believed in good faith the actions would remain on the suspension disposition calender for eighteen months from the date the test case became final, rather than the time indicated in the clerk's notice. Plaintiff states it first learned of the dismissals during a telephone conversation with the case management section of the clerk's office, after finding the clerk's removal notice while preparing a draft suggested judgment for the first stipulation. *Motion for Relief From Judgments,* at 1–2. Plaintiff filed its motion ,on June 7, 1988, 33 days after the orders of dismissal were entered.

Discussion

1

Plaintiff states that granting the requested relief will advance justice and equity because (1) plaintiff never received notices of dismissal which would have prompted it to act earlier, (2) defendant will not be prejudiced because stipulated judgments were being actively considered following the test case in which plaintiff prevailed, (3) the matter arose through mistake, inadvertence, or excusable neglect which are grounds for relief under Rule 60(b), and (4) the actions remained on the suspension disposition calender for only eight months rather than the full eighteen months allowed under Rule 85(b).

Defendant opposes restoring the actions because (1) plaintiff's motion was brought more than 30 days after entry of the dismissal orders and is thus barred under 28 U.S.C. § 2646 (1982) because Rule 60(b) of the Rules of this Court cannot enlarge the statutory 30 day limit for retrial or rehearing, and (2) plaintiff has failed to establish an appropriate basis for setting aside the dismissal orders. Defendant states "the window of jurisdiction has closed" and argues plaintiff's only remedies are a timely appeal or a request of Congress.

The Court of Customs and Patent Appeals reversed a Customs Court decision which considered the same arguments now advanced before this Court. *United States* v. *Torch Mfg. Co.*, 62 CCPA 41, 43, C.A.D. 1143, 509 F.2d 1187, 1189 (1975). The Customs Court had interpreted 28 U.S.C. § 2639, the statute which then controlled motions for rehearings and retrials, as not controlling on a motion to set aside dismissals of actions that had not been determined on their merits and which were entered because of the concurrent mistake and inadvertence of counsel. The statute then in effect, 28 U.S.C. § 2639 (as amended by the Customs Court Act of 1970, public law 91–271, effective October 1, 1970), provided:

> The judge who has rendered a judgment or order may, upon motion of a party or upon his own motion, grant a retrial or a hearing, as the case may be. A party's motion must be made or the judge's action on his own motion must be taken not later than thirty days after entry of the judgment or order.

The Court of Customs and Patent Appeals declared the Customs Court had no power to vacate orders of dismissal or cure a party's failure to comply with the statute because the Court could not enlarge its jurisdiction by its own rules. 62 CCPA at 47, 509 F.2d at 1192.

The statute now in effect, 28 U.S.C. § 2646 (1982), is substantively identical to the statute considered in *Torch:*

> After the Court of International Trade has rendered a judgment or order, the Court may, upon the motion of a party or upon its own motion, grant a retrial or rehearing, as the case may be. A motion of a party or the Court shall be made not later than thirty days after the date of entry of the judgment or order.

28 U.S.C. § 2646 (1982). The legislative history of the Customs Courts Act of 1980 shows that section 2646 was drafted as "a restatement of existing law as set forth in 28 U.S.C. § 2639". H.R. 1235, 96th Cong., 2d Sess. 62, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3774.

Plaintiff discounts this legislative history and instead places great weight on the Customs Courts Act of 1980 which conferred upon the Court of International Trade full equitable powers and the right to grant related relief. 28 U.S.C. §§ 1585, 2643(c)(1) (1982). An early decision interpreting those new powers identified Rule 60(b) of the Rules of this Court as one of the important changes attendant to

the equitable powers of the Court of International Trade. The decision, *Belwith Int'l, Ltd.* v. *United States,* 2 CIT 14 (1981), denied a motion to vacate an order of dismissal for failure to prosecute pursuant to Rule 86 of the Rules of this Court because the motion was filed more than 30 days after the date of entry of the dismissal order, and 30 days was the time limit under both 28 U.S.C. § 2646 and Rule 60(b) of the Rules of this Court. The Court instructed that the denial of the motion to vacate should not be construed to foreclose an independent equitable action under Rule 60(b) for relief from the judgment of dismissal. The Court stated that "the independent equitable action theory [under Rule 60(b)] should not be allayed by case law decided prior to the enactment of the new Customs Courts Act." *Belwith Int'l,* 2 CIT at 15. At that time, however, Rule 60(b) only allowed 30 days so that there was no conflict with the time period under 28 U.S.C. § 2646.

Rule 60(b) of the Rules of this Court has since been amended to extend the time period for motions from 30 days to one year:

> On motion of a party * * * the Court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect, * * *.
> The motion shall be made within a reasonable time, and for [reason of mistake, inadvertence, surprise, or excusable neglect] not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

The amended rule conforms to the period allowed under Rule 60(b) of Federal Rules of Civil Procedure. However, Rule 60(b) of the Rules of this Court is not coextensive with Rule 60(b) of the Federal Rules of Civil Procedure because the United States Supreme Court acted under a broader grant of authority from Congress when it promulgated the federal rules under the Rules Enabling Act:

> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072 (1982). There is no similar provision in the relevant portion of section 301 of the Customs Courts Act of 1988, 28 U.S.C. § 2633(b) (1982).

Defendant's legal argument against vacating the dismissal orders was recently rejected in *Bio-Rad Laboratories, Inc.* v. *United States,* 12 CIT ——, Slip Op. 88–84 (June 30, 1988), where the Court limited the 30 day deadline in 28 U.S.C. § 2646 (1982) to rehearings under Rule 59 of issues that were treated, revealed, or advanced in an original trial, decision, or judgment. The Court found that for motions to rehear what was done in plain sight, a limit of 30 days is proper. However, the Court found that motions under Rule 60(b) of the Rules of this Court are subject to different considerations:

> But for the motion made under Rule 60 and based on reasons which often depend on the discovery of hidden mistakes, frauds or other causes of injustice, which cannot be expected to be uncovered immediately after judgment, it would be absurd and unfair to apply the 30-day statutory limit of 28 U.S.C. § 2646. It would be equally absurd to attribute such an intention to Congress.

Bio-Rad Laboratories, 12 CIT at ——, Slip Op. 88–84 at 2–3.

The Court finds the controlling law is that expressed in *Torch*. *Torch* states the 30 day time period is a jurisdictional matter. *United States* v. *Torch Mfg. Co.,* 62 CCPA 41, 43, C.A.D. 1143, 509 F.2d 1187, 1189 (1975). *Torch* is a binding precedent which this Court must apply. *See South Corp.* v. *United States,* 1 Fed. Cir. (T) 1, 1, 690 F.2d 1368, 1369 (1982).

The Court also finds from the statutory language and legislative history of the Customs Courts Act of 1980 that 28 U.S.C. § 2646 (1982) was not intended as a substantive change in the law. H.R. 1235, 96th Cong., 2d Sess. 62, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3774.

The Court finds nothing in the statutes or legislative history of the Customs Courts Act of 1980 that allows the Court to exercise equitable powers where it lacks jurisdiction. Rule 60(b) does not independently confer jurisdiction because no Court rule can enlarge or restrict jurisdiction. *See Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U.S. 629, 635–36 (1924). Rule 1 of the Rules of this Court recognizes this and provides that "[t]he rules shall not be construed to extend or limit the jurisdiction of the court."

2

Relief is also not available under 28 U.S.C. § 1585 or § 2643(c)(1) (1982) because those statutes cannot independently confer jurisdiction where none otherwise exists. *See Star Sales & Distrib. Corp.* v. *United States,* 10 CIT ——, 663 F. Supp. 1127, 1130 (1986); *Manufacture de Machines du Haut-Rhin* v. *Von Raab,* 6 CIT 60, 66, 569 F. Supp. 877, 883, *appeal dismissed,* No. 83–1341 (Fed. Cir. Dec. 29, 1983); *Kidco, Inc.* v. *United States,* 4 CIT 103, 104 (1982).

3

If the Court was able to grant equitable relief under Rule 60(b) of the Rules of this Court, the Court would find plaintiff has an appropriate basis to set aside the dismissal orders. There is no showing of lack of diligence or willful neglect on part of the plaintiff's counsel, but rather inadvertence attributable to the death of a family member. Plaintiff's counsel's firm maintains an internal docket to record suspense dates in various stages of litigation or administrative proceedings, with a system for recording suspense dates and informing the attorneys responsible of deadlines. After discovering that the ac-

tions had been dismissed, plaintiff moved under Rule 60(b) without delay to vacate the judgments of dismissal. Additionally, plaintiff prevailed in the test case before this Court, and was actively preparing stipulations to settle the twelve actions. The interests of justice strongly support settlement between the parties according to the law as interpreted by the Courts. *See W.R. Filbin & Co.* v. *United States,* 11 CIT ——, Slip Op. 87-134 (Dec. 9, 1987).

CONCLUSION

The Court can neither enlarge its jurisdiction by its own rules nor exercise equitable powers where jurisdiction does not lie. Plaintiff's motion to vacate the orders of dismissal in case numbers 85-10-01360, 85-10-01361, 85-11-01643, 85-11-01651, 86-01-00008, 86-01-00009, 86-01-00010, 86-01-00040, 86-01-00041, 86-02-00245, 86-12-01633, and 86-12-01634 is denied.

(Slip Op. 88-107)

D & L SUPPLY CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-06-00424

Before DICARLO, *Judge.*

Application for counsel's access to business proprietary information in administrative review is granted under protective order upon Court's *de novo* review on the administrative record.

[Plaintiffs' motion for access to confidential record granted under protective order.]

(Decided August 16, 1988)

Brownstein, Zeidman & Schomer (*Irwin P. Altschuler, David R. Amerine,* and *Ronald M. Wisla*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Platte B. Moring, III*), and United States Department of Commerce, Office of the Chief Counsel for Import Administration (*Mark J. Sadoff*) for defendant.

DICARLO, *Judge:* D & L Supply Company of Orem, Utah (plaintiff), an importer of construction castings from India, moves under Rule 56.1 of the Rules of this Court for an order directing the International Trade Administration of the United States Department of Commerce (Commerce) to release business property information to plaintiff's counsel under protective order. Plaintiff claims that because its counsel is limited to the public administrative record, while counsel for the other interested parties have access to both the public and confidential administrative records, Commerce is precluding plaintiff from meaningfully participating in the administrative review in violation of 19 U.S.C. §§ 1677(c) and 1677f, normal

procedures of administrative law, 5 U.S.C. § 701 *et seq.*, and the due process protection under the fifth amendment of the United States Constitution.

Plaintiff has standing under 19 U.S.C. § 1677f(c)(2) and 28 U.S.C. § 2631(f) (1982) and the Court has jurisdiction under 28 U.S.C. § 1581(f) (1982). The Court finds under its *de novo* standard of review on the record that plaintiff's motion for access under protective order should be granted so that plaintiff may participate fully in the administrative review and preserve issues for later judicial review.

Background

Shortly after initiation of an administrative review of a countervailing duty order, *Certain Iron-Metal Construction Castings From India,* 45 Fed. Reg. 68,650 (Oct. 16, 1980), and before any information was placed in the administrative record, counsel for the United States producers of iron metal castings (domestic industry) applied for access under protective order to confidential business proprietary information that the Indian manufacturers of iron metal castings would submit to Commerce and to other confidential information that Commerce would incorporate into the administrative record.

The Indian manufacturers submitted a countervailing duty questionnaire response in August of 1987. This response contains business proprietary information concerning benefits each company received and the total sales value of exported merchandise on both company specific and country wide bases. Over objection of the Indian manufacturers, Commerce granted the domestic industry's counsel access under protective order to the questionnaire response and all future submissions of business proprietary information. The domestic industry's counsel has made several submissions incorporating this confidential information since Commerce granted access in September of 1987.

On February 4, 1988, plaintiff, a United States importer of iron-metal construction castings submitted a timely entry of appearance indicating its intention to participate in the administrative review. Plaintiff's counsel applied for access to the confidential record under protective order to facilitate their effective participation in the review. Plaintiff's counsel applied for access to the same information that Commerce granted to the domestic industry's counsel and plaintiff's applications for the administrative protective order incorporate the same protective terms as the domestic industry's applications.

On February 11, 1988, counsel for the Indian manufacturers opposed Commerce's release of confidential data under administrative protective order to plaintiff's counsel and denied that plaintiff's counsel required data for all Indian manufacturers to make its ar-

guments. Because plaintiff's counsel already had access to its supplier's rate of subsidization, counsel for the Indian suppliers stated

> [i]t is not necessary that counsel have access to the data of the other individual companies since the comparison to be made for a separate rate would be RSI's subsidization rate to the *overall* weighted average subsidization rate.

R. 2 at 2 (emphasis in original).

Commerce denied access to plaintiff's counsel on June 7, 1988, stating that there was "no demonstrable need to know on the part of counsel for D & L, and whatever needs they perceive are outweighed by the need of respondents for continued confidential treatment and by the possible competitive harm to the exporters which may be occasioned by the release of the exporters' proprietary information." R. 5.

Plaintiff filed an action in this Court within the ten day statute of limitations under 28 U.S.C. § 2636(g) (1982). Prior to the hearing on August 8, 1988 the Court satisfied itself that all of the interested parties had been previously notified of the hearing and their rights under 19 U.S.C. § 1677f(c)(2)(C) (1982) to appear and be heard.

Standard of Review

Actions to compel disclosure of business proprietary information under protective order are evaluated in this Court *de novo* on the administrative record to determine whether the need of the party requesting access to the information outweighs the need of the party submitting the information for continued confidential treatment. 19 U.S.C. § 1677f(c)(2) and 28 U.S.C. § 2640(a)(4) (1982); S. Rep. No. 249, 96th Cong., 1st Sess. 100, *reprinted in* 1979 U.S. Code Cong. & Admin. News 486; *Timken Co.* v. *United States,* 11 CIT ——, 659 F. Supp. 239, 240 (1987).

Discussion

Plaintiff's counsel claims it requires access to determine whether the countervailing duty assessment rate and the further countervailing duty deposit rate that plaintiff will pay as an importer are calculated according to law. Plaintiff claims it requires access to determine whether merchandise that is imports is entitled to a potentially lower company-specific assessment and/or deposit rate rather than a higher national rate. Upon review of the public questionnaire response, it appeared to plaintiff's counsel that the benefits one manufacturer received from a potentially countervailable program under review are substantially lower than other reporting manufacturers. Because Commerce may establish individual company countervailing duty rates when there are significant differences in benefits various firms receive, 19 U.S.C. § 1671e(a)(2)(A) (1982 & Supp. IV 1986), plaintiff argues it would benefit from countervailing duty rates assessed at a lower, company-specific rate for its suppli-

ers rather than a higher national rate. Plaintiff's counsel seeks access to the confidential record to determine under various legal theories whether plaintiff's imports are entitled to a lower company-specific rate. Without access to the confidential record, plaintiff argues that its counsel would be severely handicapped in presenting factual and legal arguments in support of a company-specific rate for plaintiff's imports.

Even if plaintiff's imports are properly subject to a national rate, plaintiff claims that access to the confidential information is necessary for counsel to review the accuracy and methodology of Commerce's calculation of the assessment and deposit rates that plaintiff will ultimately pay.

Defendant opposes granting access to plaintiff's counsel because each disclosure of information submitted in confidence dampens the propensity of foreign producers to divulge confidential information in future trade cases, *see Monsanto Indus. Chem. Co.* v. *United States*, 6 CIT 241, 243 (1983), and because Commerce desires to limit the risk of inadvertent disclosures by Limiting access to confidential information.

Plaintiffs emphasize that because the information requested has already been disclosed to counsel for the domestic industry and their non-attorney consultants, permitting plaintiff's counsel access to the same information would not significantly increase the already existing risk of inadvertent disclosure. Plaintiff denies any danger of inadvertent pricing comparisons because it does not ask for the names of the companies involved. Plaintiff emphasizes the narrow scope of its request for counsel's access under protective order and denies any significant chilling effect because the information requested has already been released to the Indian manufacturers' competitors in the United States.

Release of business proprietary information under protective order to counsel, as officers of the Court, is generally considered sufficient to address concerns that confidentiality, under any form of protective order, would seriously be at risk. *Chevron U.S.A., Inc.* v. *United States*, 11 CIT ——, Slip Op. 87-13 at 7-8 (Feb. 6, 1987). Disbarment from practice before Commerce under 19 C.F.R. § 355.20(e) (1988) and the further prospect of professional disbarment have been deemed to constitute sufficient security to counter the possible unauthorized disclosure by attorneys. *See Yale Materials Handling Corp.* v. *United States*, 11 CIT ——, 674 F. Supp. 865, 867 (1987). There is nothing to suggest that the attorneys involved in this action would not be subject to these possible disbarments for unauthorized disclosure. The attorneys are not in-house counsel who might be susceptible to demands of their corporate employers to violate a protective order. *See* Closen & Wojcik, *Lawyers Out in the Cold*, 73 A.B.A. J. 94 (Nov. 1987).

Defendant also contends that plaintiff's counsel has no need for access to the confidential record because plaintiff may presume

Commerce will apply regulations proposed three years ago in 50 Fed. Reg. 24,207 (June 10, 1985). Under these proposed regulations, defendant states plaintiff will require only the individual company rate and the national rate to make its arguments, and plaintiff's counsel will have access to these numbers without resorting to the confidential record.

Plaintiff responds that Commerce has inconsistently applied the regulation that was proposed three years ago but has still not yet been adopted. *Compare Ceramic Tile From Mexico; Final Results of Countervailing Duty Administrative Review,* 53 Fed. Reg. 15,090 (Apr. 27, 1988), *with Certain Welded Carbon Steel Pipe and Tube Products From Turkey; Final Results of Countervailing Duty Administrative Review,* 53 Fed. Reg. 9791 (Mar. 25, 1988); *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Certain Steel Wire Nails From New Zealand,* 52 Fed. Reg. 37,196 (Oct. 5, 1987); and *Final Affirmative Countervailing Duty Determination; Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25,447 (July 7, 1987). Plaintiff also asserts the proposed regulation is legally invalid under the countervailing duty statutes, but argues that even if the regulation were valid some flexibility must exist in its various applications. Plaintiff claims that without access to the confidential record under protective order, counsel may be unable to determine the basis of plaintiff's claim and effectively promote plaintiff's interests during the administrative proceedings. *See Timken Co.,* 11 CIT at ——, 659 F. Supp. at 242.

Defendant also contends plaintiff's counsel should be denied access because plaintiff's interests are adequately protected by the Indian manufacturers. Defendant asserts the Indian manufacturers and United States importers have similar interests because both are interested in achieving low rates, and the assessment rate on past entries will be the same as the deposit rates for future entries. Because the Indian manufacturers will verify Commerce's national rate while plaintiff's counsel verifies Commerce's rate for plaintiff's supplier, defendant claims the issue is entirely one of plaintiff's trust of the Indian manufacturers.

Plaintiff disputes Commerce's view of a similarity of interests between the Indian manufacturers and United States importers. Plaintiff emphasizes that it is the party that will ultimately pay the duties and cites as evidence of dissimilar interests the failure of the Indian manufacturers to request individual company rates.

CONCLUSION

The Court has reviewed the confidential record *in camera* pursuant to 28 U.S.C. § 2635(c) (1982). *See* S. Rep. No. 249, 96th Cong., 1st Sess. 100, *reprinted in* 1979 U.S. Code Cong. & Admin. News 486. Upon its *de novo* review of the record and the arguments advanced before the Court, the Court finds that plaintiff's counsel should be granted access to the confidential record under protective order so

that plaintiff may fully participate in the administrative review and preserve issues for later judicial review.

(Slip Op. 88-108)

NISSAN MOTOR MFG. CORP., U.S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87-01-00051

Before DICARLO, *Judge.*

Machinery imported to manufacture merchandise in a foreign trade zone subzone is dutiable.

[Denial of protests sustained.]

(Decided August 16, 1988)

Sharretts, Paley, Carter & Blauvelt, P.C. (*Gail T. Cumins* and *Ned H. Marshak*) for plaintiff.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice (*Michael P. Maxwell*), for defendant.

DICARLO, *Judge:* Cross-motions for summary judgment, made pursuant to Rule 56 of the Rules of this Court, frame the question of whether machinery imported to produce merchandise in a foreign trade zone subzone should be subject to duty. Nissan Motor Manufacturing Corporation U.S.A. (Nissan) moves for summary judgment requiring the United States Customs Service (Customs) to reliquidate entries of production machinery and related capital equipment and refund over $3,000,000 in duties. The United States moves for summary judgment affirming Customs' assessment of duties.

The Court finds from its review of the Foreign Trade Zones Act and the relevant legislative history that machinery and related capital equipment imported to produce merchandise in a foreign trade zone subzone are subject to duty. Defendant's motion for summary judgment is granted; Nissan's motion for summary judgment is denied.

BACKGROUND

A foreign trade zone is "an isolated, enclosed and policed area, operated as a public utility, in or adjacent to a port of entry, furnished with facilities for loading, unloading, handling, storing, manipulating, manufacturing, and exhibiting goods, and for reshipping them by land, water, or air." 15 C.F.R. § 400.101 (1988). Among other benefits, foreign trade zones often permit an importer to lessen its liability for duties or avoid quota problems. The original Foreign Trade Zones Act did not permit merchandise to be manufactured in

a zone. In 1950, section 3 of the Foreign Trade Zones Act was amended to provide that:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the Customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into Customs territory of the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from a zone into Customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise * * *.

19 U.S.C. § 81c (1982).

The Foreign Trade Zones Act is administered by the Foreign Trade Zones Board (Board), which has authority to grant to public and private corporations, as those terms are defined in 19 U.S.C. § 81a(e) and (f) (1982), the privilege of establishing, operating, and maintaining foreign trade zones in or adjacent to United States Customs ports of entry. 19 U.S.C. § 81b(a) (1982). In 1952 the Board promulgated regulations pursuant to 19 U.S.C. § 81h to authorize "zones for specialized purposes" or "subzones" in areas separate from existing free trade zones "for one or more of the specialized purposes of storing, manipulating, manufacturing, or exhibiting goods" when the Board finds that existing or authorized zones will not serve adequately the convenience of commerce with respect to the proposed purposes. 17 Fed. Reg. 5316 (June 11, 1952), now codified without amendment at 15 C.F.R. § 400.304 (1988). In contrast to general purpose zones where a municipal corporation leases a portion of the zone to firms that subsequently locate within that zone, subzones are generally used by a single firm. DeKieffer & Thompson, *Political and Policy Dimensions of Foreign Trade Zones: Expansion or the Beginning of the End?*, 18 Vand. J. Transnat'l L. 481, 492 (1985). Subzones are especially attractive to domestic manufacturers that import component parts or raw materials because the board may authorize subzones for existing or planned production facilities and thus spare manufacturers from relocating facilities to existing or authorized general purpose zones. *Id.*

The Metropolitan Nashville Port Authority applied to the Board on December 18, 1981 for authority to establish a foreign trade subzone at Nissan's vehicle manufacturing and assembly plant in Smyrna, Tennessee.

On February 2, 1982, Nissan requested a Customs ruling under 19 C.F.R. § 177.1(a)(1) regarding its future obligations for duties. Nissan stated that production machinery to be used in the subzone consisted of a highly automated integrated system of industrial ro-

bots, automated conveyor and stamping systems, and a complex computerized interface. In the proposed final configuration, Nissan noted that it was uncertain whether the machinery would be capable of full-scale production of motor vehicles, and that machinery needed to be assembled, installed and tested. As a result of these tests, Nissan stated that some or all of the machinery might be returned to the foreign manufacturers, replaced, redesigned, or scrapped as useless.

Upon the facts Nissan presented, Customs decided that production equipment imported into a foreign trade zone is not "merchandise" for purposes of the Foreign Trade Zones Act and is thus dutiable. In Nissan's case, however, Customs deferred assessment of duties on the production machinery until it was completely installed and tested in full-scale production of motor vehicles in the subzone. C.S.D. 82–103, 16 Cust. Bull. 869, 870 (1982).

The Board approved the application for the foreign trade zone subzone, *Resolution and Order Approving Applications of Metropolitan-Nashville Davidson County Port Authority for a Foreign-Trade Zone and Subzone in the Nashville Customs Port of Entry Area,* 47 Fed. Reg. 16,191 (Apr. 15, 1982), and in May of 1982 Nissan began to place in the subzone production equipment valued at approximately $116,314,883, with over $3,000,000 in assessed duties. *See* Suzman, *An Evaluation of Current Trends in Foreign Direct Investment in the Southeast United States,* 18 Vand. J. Transnat'l L. 247, 257–58 (1985) (description of the Nissan Subzone). The 29 entries involved in this action were filed on June 13, 1983 and liquidated as entered on June 6, 1986. The liquidations were protested on September 3, 1986 and denied on January 8, 1987. The Court has jurisdiction under 28 U.S.C. § 1581(a) (1982).

Discussion

I

The Foreign Trade Zones Act provides that merchandise may be brought into foreign trade zones and "may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into Customs territory of the United States * * *." 19 U.S.C. § 81c (1982).

The Court finds that the imports in this action are actively used or intended to be used to produce motor vehicles. The imports are thus not stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated or manufactured to be exported, destroyed, or sent into the Customs territory of the United States.

Given the exhaustive list of activities in the 1950 amendment, it would distort the statute's plain language to read in other terms such as "installed," "affixed," "used," "consumed," or "operated." A general rule of statutory construction is that the expression of one thing is the exclusion of the alternative, *exressio unius est exclusio alterius. See United States* v. *Douglas Aircraft Co.*, 62 CCPA 54, 59, C.A.D. 1145 (1975). None of the activities that Congress identified in its comprehensive list permit installation or operation of production equipment without payment of duties.

In addition to a plain reading of the statute, the legislative history of the 1950 amendment to the Foreign Trade Zones Act is instructive on Congress' intent:

> The first proviso to section 3 of the act of June 18, 1934, now authorizes the appraisement and liquidation of duties on foreign merchandise when it is first admitted to a zone, such duties not to be paid until the merchandise is sent into customs territory. This privilege has not been used by importers, possibly because the proviso also imposes an absolute requirement that the duties be paid within a maximum of 2 years, even if the merchandise is never sent into customs territory. The proposed legislation would modify this proviso in several respects. The importer would secure a finding of the taxes as well as the duties on his merchandise. This finding could be requested either when the foreign merchandise first entered a zone or at any time during its stay in the zone unless and until there was a manipulation or manufacture effecting a change in tariff qualification of the merchandise. The proposed legislation would authorize such a finding, once made, would thereafter govern the dutiable and taxable status of the merchandise whenever it was sent into customs territory, whether or not it had been manipulated or manufactured in the zone in the meantime. The present absolute requirement for payment of duties on merchandise obtaining a privileged status under the proviso would be eliminated. Duties and taxes would be payable in accordance with the finding only if and when the merchandise was sent into customs territory. *The amended proviso would not authorize consumption of merchandise in a zone, but would authorize its exportation or destruction without the payment of the liquidated duties and determined taxes thereon.*

S. Rep. No. 1107, 81st Cong., 2d Sess. (1949), *reprinted in* 1950 U.S. Code Cong. & Admin. News 2535–36 (emphasis added). Defendant interprets this history to show Congress' intent that zones not be used to completely avoid duties on production equipment that is consumed (used) in the zone.

Defendant's interpretation is further supported by legislative history amending the Foreign Trade Zones Act (P.L. 98–573), which states expressly that under the Act as amended in 1950, the exemption of payment of duties for merchandise imported into a foreign trade zone "does not apply to machinery and equipment that is imported for use (for manufacturing and the like) within a foreign

trade zone." S. Rep. No. 308, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 4944–45. Although this observation was made in 1984 after the production machinery was imported into the Nissan subzone, the statement dovetails with the legislative history of the 1950 amendment. "While in general it is legislative history prior to and at the time of enactment which is most helpful in ascertaining intention, yet, we [as judges] are not to ignore the legislative history in connection with subsequent congressional consideration of the legislation, incidental to modifying enactments or to reenactments." *Ellis K. Orlowitz Co.* v. *United States,* 74 Cust. Ct. 583, 590, A.R.D. 136, 200 F. Supp. 302, 308 (1960), *aff'd,* 50 CCPA 36, C.A.D. 816 (1963). *See also Butler* v. *United States Dep't of Agriculture,* 826 F.2d 409, 414 n.6 (5th Cir. 1987) (although subsequent congressional statements are worthy of less weight than contemporaneous ones, they are nevertheless entitled to careful consideration as secondarily authoritative expression of expert opinion).

In a Customs Service Decision on production machinery imported from Japan for use in another foreign trade zone, Customs stated that "not every article can be termed "merchandise.'" C.S.D. 79–418, 13 Cust. Bull. 1627, 1627 (1979). Customs stated that Congress'

> very action of listing the permitted operations rather than simply stating that foreign merchandise could be admitted free of duty was purposeful. The list does not permit an article to be brought into a zone, free of duty, to be used as production equipment to make other articles. The clear intent was to limit the scope of permitted operations is shown in the restriction on the term "manufactured" by the language "* * * except as otherwise provided in this chapter * * *," and in the discussion of the fifth proviso to section 3 in the Senate Report No. 1177, 81 Cong. (September 26, 1949).

13 Cust. Bull. at 1629–30. Customs also found support in Congress' rejection of legislative proposals to specifically permit entry of production equipment into foreign trade zones without payment of duties.

This case is not the first judicial review of the dutiable status of imports in a foreign trade zone subzone. In *Hawaiian Indep. Refinery* v. *United States,* 81 Cust. Ct. 117, C.D. 4777, 460 F. Supp. 1249 (1978), *appeals dismissed,* 66 CCPA 135 (1979), crude oil was imported into a foreign trade zone subzone and processed at the oil refinery in the subzone. Some of the processed crude oil was then stored and used as needed as a source of fuel for the refinery's operations. Customs required the plaintiff to file consumption entries for refined crude oil used as fuel within the zone and classified the fuel under the Tariff Schedules of the United States (TSUS). The plaintiff protested Customs' decision and claimed the refined crude oil was not subject to duty because it never entered customs territory.

The United States Customs Court found from the free trade zone statutes and regulations that distinct lines were drawn between the boundaries delineating the geographical territory of the United States and the Customs territory of the United States. The Court stated that:

> Resort to the legislative history of the Foreign Trade Zones Act, and its amendments, confirms the conclusion that foreign merchandise is not subject to duty until it actually enters the customs territory of the United States.

81 Cust. Ct. at 123, 460 F. Supp. at 1254. The Court thus agreed that the refined crude oil used as a secondary source of fuel in the subzone refinery was not dutiable:

> In view of the fact that Congress, in enacting the Foreign Trade Zones Act and its amendments, has provided for distinct geographical zones separate from our customs territory, the defendant's argument for the dutiability of the instant merchandise which remains within Sub-zone 9–A is without persuasion. Merchandise which does not actually enter the customs territory of the United States is not dutiable under the Tariff Schedules of the United States.

Id. at 124, 460 F. Supp. 1255. The dicta in *Hawaiian Indep. Refinery* indicates that the Court reached its decision strictly on a territorial interpretation of the Foreign Trade Zones Act.

Defendant distinguishes *Hawaiian Indep. Refinery* on the basis that while refined crude oil is merchandise within the meaning of the Foreign Trade Zones Act, production equipment is not merchandise because Congress' exhaustive list of permissible operations does not permit an article to be brought into a zone, free of duty, to be used as production machinery to make other articles.

As a matter of public policy, defendant states that Congress did not intend to place domestic manufacturers or sellers of production machinery at a competitive disadvantage with foreign-manufactured production machinery that could be imported without duty for foreign trade zones and sold cheaper.

The Court finds that the exhaustive list of permitted activities and the relevant legislative history show that foreign-manufactured machinery imported to manufacture goods in a foreign trade zone are not exempt from duty.

2

Noting that *Hawaiian Indep. Refinery* stated that "merchandise is not subject to the customs laws while in a zone, unless the Foreign Trade Zones Act authorizes their application", 81 Cust. Ct. at 122, 460 F. Supp. at 1254, defendant also argues that the Act authorizes application of the tariff schedules to Nissan's production equipment because the Board specifically contemplated payment of these duties in creating Nissan's subzone. Defendant asserts that

because the Board is directed to "prescribe such rules and regulations * * * as may be necessary to carry out" the Act, 19 U.S.C. § 81h (1982), Nissan cannot avoid payment of duties on its production equipment.

Defendant asserts that Nissan implicitly acknowledged its obligation to pay duties on production equipment in the "formal and complete application to establish a foreign trade zone" and a "Basic Plan for the FTZ System" which were submitted in May of 1982. *Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment,* at 21–23. Defendant asserts "[t]hese documents define the scope of the zone granted by the Board." *Id.* at 23.

Without addressing the Board's authority to condition the granting of a zone or subzone on the payment of duties on production equipment, the Court finds that the Board did not condition the grant of Nissan's subzone on any implicit promises in the May documents to pay duties. The Court reaches this conclusion because the Board had already adopted its "Resolution and Order" on March 30, 1982, and delivered its "Grant of Authority" on April 2, 1982. Both documents were then published in the *Federal Register. Resolution and Order Approving Applications of Metropolitan-Nashville Davidson County Port Authority for a Foreign-Trade Zone and Subzone in the Nashville Customs Port of Entry Area,* 47 Fed. Reg. 16,191 (Apr. 15, 1982). Contrary to defendant's assertion that "[t]he Board's grant of the Port Authority's and Nissan's application plainly required the payment of duties on production equipment," *Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment,* at 23, the Board required Nissan to abide by only the "provisions, conditions, and restrictions of the Act and the regulations issued thereunder," as well as certain "express conditions and limitations" enumerated in the grant. 47 Fed. Reg. at 16,191. Nowhere did the Board "plainly require" Nissan to pay duty on production machinery remaining in the zone.

Nissan states defendant is confusing the actions of the Board and Customs, because the Board's decision to approve Nissan's subzone is totally unrelated to the subsequent manner in which Customs required Nissan to enter production machinery into the zone. Regarding the actions of Customs, Nissan states that its ruling request in February of 1982 acknowledged that in C.S.D. 79–418, 13 Cust. Bull. 1627 (1979), Customs had limited *Hawaiian Indep. Refinery* to the facts of that case. Therefore, Nissan based its claim on the realization that C.S.D. 79–418 could only be overturned by appeal to the Court of International Trade. Similarly, in Nissan's "Basic Plan for FTZ System Design" and Customs Form 216, Nissan states that it accepted the fact that Customs would not allow an importer to bring production machinery into a foreign trade zone free of duty:

> In this regard, there is absolutely no requirement that a party wishing to challenge a Customs Service decision indicate its disagreement with Customs at the time of entry. Importers routinely enter merchandise in the manner required by Customs, and the protest liquidation of entries pursuant to Section 514, Tariff Act of 1930, as amended. These normal Customs procedures apply to FTZ merchandise, as the Government itself has acknowledged by admitting that this Court has jurisdiction over the entries in issue. Thus, the fact that a Zone applicant computes the economic benefit to be derived from an FTZ based on Customs' position at time of entry does not bar the Zone grantee from challenging that position through litigation * * *. [Nissan] is not precluded from challenging Customs position as to the dutiability of production machinery merely because [Nissan] correctly recognized that it would be futile to convince the Customs Service to overturn its position, and that it therefore would be required to challenge Customs' decision in the CIT.

Plaintiff's Response to Defendant's Statement of Material Facts, at 12–14.

Similar to where the Court of International Trade has not required plaintiffs to argue before an agency that the agency should not apply its own regulation, *Rhone Poulenc, S.A.* v. *United States,* 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984), the Court finds that Nissan complied with Customs' requirements in order to preserve its right to judicial review in this Court after denial of a protest rather than subject itself to a finding of estoppel.

Regarding actions of the Board, the Court finds that Nissan's December 18, 1981 application to the Board made no reference to the dutiable status of production machinery and the Board's grant of authority neither restricted Nissan's right to enter production machinery into the zone without paying duty nor conditioned the grant on Nissan's waiving its right to challenge Customs' entry requirements by filing a protest against liquidation and commencing an action in this Court to challenge denial of the protest. The situation is similar to *Hawaiian Indep. Refinery,* where the Court found the Board's grant of authority "was in no way conditioned upon the use of duty paid fuel." 81 Cust. Ct. at 126, 460 F. Supp. at 1257.

The documents accompanying the motions for summary judgment do not support defendant's second argument that Nissan must pay duties because it agreed to do so or was required to do so in the Board's grant of authority. However, the failure of defendant's second argument does not defeat the success of its first argument based on the statute and legislative history.

Conclusion

Based on the language of the Foreign Trade Zones Act, as amended, and the relevant legislative history, the Court holds that production machinery and related capital equipment are dutiable. Customs' determination to assess duties on the production machin-

ery is affirmed. Nissan's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Judgment will be entered accordingly.

(Slip Op. 88–109)

SONCO STEEL TUBE DIV., FERRUM, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86–07–00899

[Remanded.]

(Dated August 18, 1988)

Dow, Lohnes & Albertson (*William Silverman, Carrie A. Simon* and Douglas J. Heffner), for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, (*Platte B. Moring, III*), Civil Division, United States Department of Justice, for defendant.

Dewey, Ballantine, Bushby, Palmer & Wood (*Michael H. Stein*) for defendant-intervenor.

OPINION AND ORDER

RESTANI, *Judge:* Plaintiff, Sonco Steel Tube Division, Ferrum, Inc. (Sonco), contests a final determination by the United States Department of Commerce, International Trade Administration (ITA) that oil country tubular goods (OCTG)[1] from Canada are being sold in the United States at less than fair value. *Oil Country Tubular Goods from Canada*, 51 Fed. Reg. 15,029 (Apr. 22, 1986), as amended, *Oil Country Tubular Goods (OCTG) from Canada*, 51 Fed. Reg. 29,579 (Aug. 19 1986). Before the Court is plaintiff's motion for judgment upon the agency record, pursuant to Rule 56.1 of the rules of this Court. Defendant, United States, opposes plaintiff's motion and seeks affirmance of the administrative determination under challenge.

BACKGROUND

A petition was filed with ITA in July 1985 on behalf of the domestic OCTG industry alleging that imports of OCTG from Canada were being, or were likely to be, sold in the United States at less than fair value, and that these imports were materially injurious, or threatening to injure, an industry in the United States. *See* 19 U.S.C. § 1673 (1982 & Supp. IV 1986). ITA published notice of its determination to initiate an Investigation in August. *Oil Country Tubular Goods from Canada*, 50 Fed. Reg. 33,387 (Aug. 19, 1985).

[1] OCTG are hollow steel products of circular cross-section intended for use in drilling for oil or gas. 51 Fed. Reg. at 15,030.

ITA sent questionnaires to four Canadaian OCTG producers under investigation, including Sonco. After examining the responses of the Canadian companies, ITA issued its preliminary determination that imports of OCTG from Canada were being sold at less than fair value in the United States, and that Sonco's imports were being dumped at a margin of 0.82 percent. *Oil Country Tubular Goods from Canada,* 51 Fed. Reg. 660, 662 (Jan. 7, 1986).

ITA published its final affirmative antidumping duty determination in April 1986, finding Sonco to have sold OCTG in the United States at a weighted average dumping margin of 3.35 percent during the period of investigation. 51 Fed. Reg. at 15,036. After the United States International Trade Commission issued its final determination of material injury, ITA published an antidumping order requiring the cash deposit of estimated antidumping duties, on all entries of OCTG from Canada at the rates set at ITA's final less than fair value determination. *Oil Country Tubular Goods (OCTG) from Canada,* 51 Fed. Reg. 21,782 (Jun. 16, 1986).

In response to complaints that certain errors had been made in ITA's final determination, ITA amended both its June 16 antidumping order and the underlying final determination to increase plaintiff's weighted average dumping margin from 3.35 percent to 3.48 percent. 51 Fed. Reg. 29,579.

Arguments

Under the Tariff Act of 1930, as amended, dumping margins are measured by calculating the amount by which foreign market value exceeds the United States price of imported merchandise. 19 U.S.C. § 1673 (1982 & Supp. IV 1986). The methods by which foreign market value and United States price are determined are specifically provided for in the Act. 19 U.S.C. §§ 1677a–1677b (1982 & Supp. IV 1986). In the present action, plaintiff contends that ITA made several errors in determining and adjusting the foreign market value and United States price of the subject OCTG. Plaintiff also alleges that ITA acted improperly when it amended its final determination to increase Sonco's dumping margin. Specifically plaintiff claims that:

(1) ITA's decision to treat limited service OCTG as a fully costed product, rather than as a by-product, in its calculation of constructed value is contrary to ITA precedent and produces an unreasonable result that is contrary to the intent of the antidumping law.

(2) ITA acted contrary to law by including in its fair value comparison U.S. sales that were made out of the ordinary course of trade.

(3) ITA erred by failing to adjust foreign market value for differences in early payment discounts provided to Sonco's U.S. and home market customers.

(4) ITA erred by amending its final determination to change policies.
(5) ITA's rule concerning the deduction from Exporters Sales Price (ESP) of the profit attributable to further processed ESP sales is invalid because it was not promulgated in accordance with the notice and comment Procedures of the Administrative Procedure Act (APA).
(6) ITA's amended final determination and antidumping duty order failed to correct certain clerical errors in the final determination that inflate Sonco's dumping margin.

Discussion

I. ITA's Treatment of Limited Service OCTG

Plaintiff's first argument is essentially identical to that made by IPSCO, Inc., another Canadian producer of OCTG subject to this same investigation, in its challenge of ITA's final determination. That challenge was recently addressed by the Court in *IPSCO, Inc. v. United States*, 12 CIT ——, Slip Op. 88-56, at 5-13 (May 6, 1988). The Court's extensive discussion of this issue need not be repeated here.

In summary, the Court concluded that it is unable to discern from the determination what standard ITA is applying in making the co-product/by-product distinction and, if it differs from former agency or generally accepted accounting principle standards, why it is being applied. The Court reasoned that it first must be able to discern if the criteria which are applied are reasonable before it can determine if the defendant has relied on substantial evidence. In this case, as in *IPSCO*, this matter is remanded to ITA for reconsideration and a fuller explanation of the basis for whatever by-product/co-product choice it makes.

II. U.S. Sales "Not Made in the Ordinary Course of Trade"

Plaintiff contends in this case, as in *IPSCO*, that ITA acted in a manner contrary to law by including in its fair value comparison certain U.S. sales which it believes were made "out of the ordinary course of trade." According to plaintiff, the transactions at issue involved "short ends of non-API limited service pipe that resulted from Sonco's conversion of steel coils (also known as 'skelp') for one of its conversion customers." Plaintiff's Brief at 34. Plaintiff's challenge ITA's decision to include this merchandise in the fair value comparison once it had verified that this merchandise did not belong to Sonco and that Sonco had disposed of it only after the customer refused to claim it. *Id.* (citing Confidential Record Document Number (CR) 61, at 2015A).

In support of its position, plaintiff argues that: (1) legislative history and ITA policy require ITA to compare only those sales that are made in the ordinary course of trade, and (2) ITA's own

precedent requires that ITA exclude from its fair value comparison U.S. sales that are not made in the ordinary course of trade.

In *IPSCO,* the Court rejected plaintiffs' argument that the statutory scheme required the administering authority to exclude all sales made out of the ordinary course of trade from its determination of U.S. price. For the same reasons, the Court rejects plaintiff's similar arguments here. Nonetheless, this issue was remanded to ITA because the Court was uncertain as to whether the agency actually asserts that it *must* include all U.S. sales in its fair value comparison, whether or not they are made in the ordinary course of trade, and without regard to representativeness, fairness of the comparison or the purpose of the act, or whether ITA asserts that it exercised discretion in this area, but decided that the particular sales at issue must be included for some sound reason.[2]

As in IPSCO, defendant did not address its practices in other cases or its statements of policy. If, as ITA's precedent indicates, it has some discretion to exclude certain limited sales that are unrepresentative of respondent's practices in the U.S. market, the sale of this particular merchandise would seem to be eligible for exclusion. Inasmuch as ITA has provided little explanation for its inclusion of this sale, and because defendant's arguments to this Court conflict with ITA's past precedent, ITA is directed to reconsider this portion of its determination, and to provide a full explanation for its decision.

III. Early Payment Discounts

Plaintiff next challenges ITA's treatment of early payment discounts provided to Sonco's U.S. and home market customers. According to information submitted by plaintiff, Sales Verification Record Document Number 3, at 140–171, which was subsequently verified by ITA, CR 61, at 2014A, Sonco provides certain discounts to its U.S. customers if the customers pay for merchandise shortly after delivery. Plaintiff maintains that, although Sonco had no home market sales of OCTG during the period of investigation, Sonco offers a similar early payment discount on home market sales of the "same general class of merchandise as OCTG." Plaintiff believes ITA should have treated the discounts as circumstances of sale and adjusted foreign market value to arrive at a fair comparison. Plaintiff's Brief at 40. Defendant acknowledges that Sonco offers a discount to all of its customers, both foreign and domestic. Defendant's Brief at 20 n.22.

[2] Plaintiff argues that it was inappropriate for ITA to assign a constructed value to the conversion customer's merchandise which it sold because Sonco was fully paid for its conversion services and incurred no cost in its production. One domestic interested party agrees with plaintiff that "these sales are out of the ordinary course of trade and should be disregarded for the purposes of the fair value determination." CR 35, at 19A, Comments on Sonco's Questionnaire Response on Behalf of the Oil Country Tubular Goods Subcommittee, The Committee on Pipe and Tube Imports and its Individual Member Producers. While the Court agrees with ITA that the scope of this investigation was not limited by the manufacturer of the merchandise, Public Amended Record Document Number (Amend. PR) 14, at 88, the Court notes that excluding this type of sale from the fair value comparison may be consistent with at least one recent ITA determination, post-dating the final determination in this case, *Fabric and Expanded Neoprene Laminate from Taiwan*, 52 Fed. Reg. 37,193 (Oct. 5, 1987). In that determination, the agency excluded certain U.S. sales from its fair value comparison after concluding that, "the unusual circumstances surrounding these sales indicate that they are not representative of respondent's selling practices in the U.S. market." *Id.* at 37,194.

During the course of the investigation, plaintiff requested that ITA treat differences in early payment discounts as well as differences in credit expenses in the respective markets as circumstances of sale adjustments to foreign market value pursuant to the statute, 19 U.S.C. § 1677b(a)(4)(B) (1982) and ITA regulations, 19 C.F.R. § 353.15(a) (1987). In its final determination, ITA adjusted foreign market value for differences in credit expenses but rejected plaintiff's argument that early payment discounts are properly treated as circumstances of sale warranting an adjustment. Instead, ITA treated Sonco's discounts in the U.S. market as reductions in U.S. price, and made no adjustment to foreign market value. Explaining its position, ITA stated that:

> A reduction for an early payment discount from the price has been a longstanding administrative practice. A discount represents a reduction in the price paid by the customer and must be deducted in calculating U.S. price. It is not a circumstance of sale adjustment.

51 Fed. Reg. at 15,003.[3]

While Congress has given ITA broad discretion to determine whether a factor or condition of sale warrants an adjustment in foreign market value for circumstances of sale, *Carlisle Tire & Rubber Co.* v. *United States*, 9 CIT 520, 528, 622 F. Supp. 1071, 1078 (1985), that discretion must be exercised reasonably and in a non-arbitrary manner. In this case, ITA refused to allow a circumstances of sale adjustment apparently basing its decision on what it refers to as the "longstanding administrative practice" of treating discounts as reductions in price. Defendant has cited numerous recent ITA determinations in which the agency has acted in accordance with such practice. *See* Defendant's Brief at 24 n.26. As recently as March 1986, however, ITA permitted an adjustment to foreign market value based on constructed value for early payment discounts. *Tool Steel from the Federal Republic of Germany,* 51 Fed. Reg. 10,071 (Mar. 24, 1986) (Correction to Early Determination of Antidumping Duty). In that determination, ITA stated, "[w]e have made adjustments to constructed value, where applicable, for early payment discounts." *Id.*

Citing *Tool Steel*, plaintiff argues that ITA's refusal to treat early payment discounts as a circumstances of sale adjustment in this case, is contrary to agency precedent. Plaintiff's Brief at 42. Acknowledging the *Tool Steel* determination, defendant responds that "although the agency has authority to treat discounts as circumstances of sales adjustments and has done so in the past, it generally considers discounts as a reduction in United States price." Defendant's Brief at 23 (footnote omitted).

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[3] ITA also rejected plaintiff's suggestion that the discount be treated as an offset to credit expenses for the same reason. 51 Fed. Reg. at 15,003. *See* Plaintiff's Brief at 43–44. As indicated, *infra*, the Court cannot conclude that the agency has acted reasonably on the basis of this brief explanation. A fuller explanation is required.

As the Court sees it, *Tool Steel* may stand for either one of two propositions. First, as defendant states in its brief, it may mean that ITA treats early payment discounts as circumstances of sale adjustments in certain situations, while treating them as reductions in price in others. Second, the adjustment made in *Tool Steel* may not have been a circumstances of sale adjustment at all, but rather some other type of factor used in calculating constructed value.

The first *Tool Steel* scenario presents the Court with problems stemming from the fundamental difference between a policy which treats discounts as circumstances of sale adjustments and one which treats discounts as reductions in price in the respective markets. According to the statute, a circumstances of sale adjustment allows the administering authority, ITA, to make "due allowance" for differences in circumstances of sales in the two markets being compared. 19 U.S.C. § 1677b(a)(4)(B) (1982). It is intended to address and correct situations in which a difference (or a lack of a difference) between United States price and foreign market value is "wholly or partly due to * * * differences in circumstances of sale." *Id.* Thus, in the present case, if it was established to the satisfaction of ITA that early payment discounts should be treated as circumstances of sale adjustments, ITA would determine the difference in discounts given in the respective markets and make an adjustment to foreign market value which would essentially factor this difference out of the fair value comparison.

An adjustment which factors such differences out of the fair value comparison is entirely different from a policy which merely treats discounts as reductions in price on both sides of the comparison. Under this latter policy, differences in discounts given in each market would be reflected in the fair value comparison—not factored out.

Thus, if *Tool Steel* does stand for the proposition that ITA may, sometimes, treat discounts as circumstances of sale adjustments, but such treatment is not appropriate here, ITA must explain why. No such explanation has been provided here. ITA's only statement on the issue, that a "reduction for an early payment discount from the price has been a longstanding administrative practice" does not suffice. Without further explanation of the reasons supporting the agency's decision, the Court cannot conclude that the agency has acted reasonably simply because it has utilized a methodology here which it has utilized previously more times than not.

Furthermore, if there is a valid distinction to be made among types of cases and if this is the type of case in which the adjustment for circumstances of sale may be made, the agency must explain why such an adjustment was denied in this case. In doing so, the Court recognizes that the burden of demonstrating entitlement to a circumstances of sale adjustment is on the party requesting the ad-

justment.[4] While it is entirely possible that plaintiff has not satisfied this burden in this case, this is not apparent from the administrative record or ITA's final determination.[5] [6]

It is also possible that the adjustment referred to in *Tool Steel* was not a circumstances of sale adjustment, but rather some other type of adjustment to constructed foreign market value, roughly equivalent to a reduction in price which would have been made had the agency established the existence of such discounts in the home market and based foreign market value on home market sales. Previous ITA determinations indicate that the agency does make reductions to home market price for early payment discounts when foreign market value is based on home market sales. *See, e.g., Industrial Phosphoric Acid from Belgium,* 52 Fed. Reg. 25,436, 25,437 (Jul. 7, 1987). Under this theory, *Tool Steel* may stand for the proposition that ITA may account for early payment discounts when applicable in the home market, even if foreign market value is based on constructed value. Such a policy would appear consistent with this Court's previous statement that "constructed value is merely a proxy for price-based value, used by the agency when price-based value is not available." *Timken Co.* v. *United States,* 11 CIT ——, 673 F. Supp. 495, 508 (1987). Thus, if it is ITA's policy to calculate constructed value in a manner which reflects early payment discounts in the home market, ITA must explain why such an adjustment was not made here.

In summary, ITA should clarify whether it is agency policy to account for differing early payment discounts in the respective markets using a circumstances of sale adjustment, and if so under what circumstances. If a circumstances of sale adjustment could have been made here, ITA should indicate why plaintiff has not demonstrated entitlement to such an adjustment. If it is not agency policy to make circumstances of sale adjustments for early payment discounts, ITA must explain why it has made no other adjustment to constructed value. In either event, a complete explanation of the relevant portion of *Tool Steel* should be provided.

IV. The Amended Determination

Plaintiff next challenges two aspects of ITA's amended final determination. In announcing its action, ITA explained these particular changes were "based on the Department's current methodology at the time of the final determination in this case." Amend. PR 26, at 288. Plaintiff disputes this characterization and claims that the

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[4] The statute requires an adjustment to foreign market value only "*if it is established to the satisfaction of the administering authority* that the amount of any difference between United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to * * * other differences in circumstances of sales" 19 U.S.C. § 1677b(a)(4) (emphasis added).

[5] Defendant does argue in its brief that ITA disallowed the claimed adjustment because it was unable to verify actual costs incurred in the implementation of the program. It is not apparent from the record, and defendant has made no citations to the record, which indicate that this was ITA's reasoning.

[6] It should be noted that in calculating credit terms between markets, for which ITA allowed a circumstance of sale adjustment, ITA compared Sonco's U.S. sales of OCTG with its Canadian sales of standard pipe, water well casing and line pipe, none of which are OCTG products subject to this investigation. CR 61, at 2014. Plaintiff requests similar treatment for their early payment discounts. Plaintiff's Brief at 43 n.9. It does not appear from the record that ITA attempted any such comparison.

changes were improper because they were the result of policy changes at ITA.

As a preliminary matter, the Court notes that

> It is now well established that amendment, before or after remand, is appropriate when the agency has utilized a legally improper method in making a determination or when the original determination contains an error of inadvertence or mistake.

Badger-Powhatan, a Div. of Figgie Int'l. v. *United States,* 10 CIT ——, 633 F. Supp. 1364, 1368 (1986). Previously, the Court had defined the scope of "error of inadvertence or mistake" to include overlooking the agency's own "precedent in a situation in which it appears clearly applicable, although the precedent resulted from discretionary considerations * * *." *Melamine Chemicals Inc.* v. *United States,* 8 CIT 105, 107, 592 F. Supp. 1338, 1341 (1984). In *Melamine,* ITA initially made a final determination that sales of melamine from the Netherlands were being sold at less than fair value. ITA then determined that it had not properly applied its regulation concerning calculation of exchange rates during periods of rate fluctuation in its original determination and amended its decision to find no less than fair value sales. The Court upheld this amendment noting that ITA was attempting to apply existing policy and precedent rather than changing policy. 8 CIT at 107, 592 F. Supp. at 1340–41.

Plaintiff's first challenge is based upon its allegation that ITA "substituted the actual interest expense that it verified and used in the final determination with an 'interest expense apportioned to accounts receivable.'" Plaintiff's Brief at 60 (*citing* Amend. PR 26, at 288). The quoted language which plaintiff relies upon comes from an ITA memorandum which states that "home market credit expenses, as reported in the sales listing, have been *substituted for* the interest expense apportioned to accounts receivable." Amend. PR 26, at 288 (emphasis added). Plaintiff's allegation is at odds with the plain meaning of the ITA statement upon which it relies.[7] Plaintiff has failed to demonstrate that ITA undertook the action which it alleges and challenges. Accordingly, the Court finds no basis for this particular claim.[8]

Next, plaintiff raises several challenges concerning ITA's deduction of profit associated with further processing in the United States from exporters sales price (ESP)[9] in its amended determina-

[7] Initially, when plaintiff cited this statement in its complaint, it inserted an editorial *sic* after the words "substituted for." Plaintiff's First Amended Complaint at ¶72.

[8] Neither the citations and arguments provided by the parties, nor the Court's own review of the record, has enabled the Court to determine that ITA took the specific actions that plaintiff alleges and challenges.

[9] When merchandise is sold to an unrelated purchaser after its importation into the United States, ITA determines United States price using exporters sales price as defined at 19 U.S.C. § 1677a(c) (1982). In this case, OCTG was imported into the U.S., subjected to further processing (threading and coupling) by a related firm, and then sold to unrelated purchasers. The particular deduction for profit made in this case was for profit associated with value added in the United States, rather than for other forms of profit that might be associated with sales in the United States. *See Timken Co.* v. *United States,* 10 CIT ——, 630 F. Supp. 1327 (1986) (governed by the Antidumping Act of 1921) and 11 CIT ——, 673 F. Supp. 495 (1987) (governed by current law) (finding that ITA was not required to interpret the statutory ESP deduction for "commissions" to include deductions for profits as well).

tion. *See* Amend. PR 26, at 288.[10] Plaintiff argues that ITA's methodology in this case is contrary to the statute and ITA's regulations, that it was improper for ITA to introduce that methodology into this case at the amended determination, and that ITA could not use that methodology until it had subjected it to formal notice and comment rulemaking procedures. Defendant maintains that the deduction of profit on value added in the United States was consistent with the statute, ITA regulations, and agency practice at the time of the original determination. Defendant further responds that it was merely correcting an error it had made in the original determination, and that it was not required to go through formal rulemaking procedures before considering profit in ESP adjustments for value added in the United States.

Plaintiff cites the statute, ITA's regulations, and the promulgation history of those regulations in support of its position that ITA could not, and did not, have a policy providing for consideration of profit as an element of ESP adjustments for value added in the United States.

Neither the statute nor the regulation specifically addresses the issue of profit as an ESP deduction where value has been added in the United States. The statute merely provides for an ESP deduction for:

> any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677a(e)(3) (1982). The language of ITA's regulation implementing this statute is essentially identical, adding only that "value generally will be determined from the costs of material, labor and other expenses incurred in such manufacture or assembly." 19 C.F.R. § 353.10(e)(3) (1987). The plain words of the statute and regulation neither expressly prohibit nor require ITA to consider profit as an element of value added.

Although ITA did reject a specific proposed regulation regarding ESP value added adjustments for profit, it acknowledged the existence of a policy permitting some adjustments, and announced its desire to gain further experience with such adjustments before adopting any specific proposals.[11] While formal rulemaking procedures might be required before ITA could adopt the specific type of rule which ITA rejected in 1980, it is not precluded from construing the

[10] ITA stated that "U.S. manufacturing cost has been adjusted by the profit or loss on each sale, with profit allocated proportionally to the cost elements including U.S. manufacturing costs." *Id.*

[11] Initially, the Treasury Department, which administered the antidumping law before ITA, proposed what it described as a provision that "reflects recently adopted practice by providing that if the value of merchandise when imported is less than 80% of the price when sold to a party unrelated to the exporter, an allocation of profit attributable to the addition of post-importation material, labor or services shall be included in the adjustments made. Proposed Revision of the Customs Regulations Relating to Antidumping Duties, 44 Fed. Reg. 59,742, 59,744, 59,749 (Oct. 16, 1979) (Treasury's proposed revision of 19 CFR § 153.10(e)(3)). ITA acknowledged that "[t]he proposal reflected, in part, past practice," which had never been incorporated into Treasury's Regulations. Antidumping Duties, 45 Fed Reg. 8,182, 8,184, (Feb 6, 1980) (ITA's adoption of 19 CFR § 353.10(e)(3)). In response to comments which "criticized the '80 percent rule' as arbitrary and contrary to commercial considerations governing profits," *Id.*, ITA decided to defer this, and other, provisions to permit further study, explaining that "the Department prefers to gain more experience with them prior to publishing final regulations." *Id.* at 8,182.

statute to cover profit as a factor in value added and making ESP adjustments.[12] *See Carlisle Tire & Rubber Co.* v. *United States,* 10 CIT ——, 634, F. Supp. 419, 423 (1986); *IPSCO, Inc.* v. *United States,* 12 CIT ——, Slip Op. 88–54, at 27–39 (May 4, 1988).

Although defendant asserts that ITA actually did have a policy of making ESP value added adjustments for profit, it cites only determinations or statements which post-date the final determination in this case. *See Brass Sheet and Strip From the Federal Republic of Germany,* 52 Fed. Reg. 822, 823 (Jan. 9, 1987); *Erasable Programmable Read Only Memories (EPROMS) From Japan,* 51 Fed. Reg. 39,680 39,681 (Oct. 30, 1986). A statement by ITA on this issue, which pre-dates the final determination in this case, does exist, however.

In explaining its methodology to Congress, ITA stated in 1985 that the purpose of ESP adjustments for value added is to enable ITA to arrive at "the determination of the appropriate ESP for the merchandise in its condition at the time of importation." Department of Commerce, Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change 34–35 (Nov. 1985). It went on to provide the following example of the scope of such an adjustment:

> In *Cellular Mobile Telephones and Subassemblies from Japan* (50 FR 45447, 10/31/85), we based the ESP of certain subassemblies on the selling price of finished CMTs and deducted the value added, including general expenses and profit. We did this because there were no sales of subassemblies to unrelated purchasers in the U.S.

Id. at 35.[13] Given these official statements of policy to Congress, the determination cited therein, and statements made during the promulgation of ITA's initial regulations, the Court finds no reason to dispute ITA's statement in this case that its treatment of profit associated with value added in the United States was "based on the Department's current methodology at the time of the final determination in this case." Amend. PR 26, at 288. Thus, ITA is allowed to amend its determination to conform to existing policy and practice.[14]

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[12] Plaintiff makes much of ITA's language that "it was determined to defer this provision to permit further study." 45 Fed. Reg. at 8,184. By deferring adoption of this and other provisions, ITA explained that it "prefers to gain more experience with them prior to publishing final regulations." 45 Fed. Reg. at 8,182. To argue that ITA may not proceed to consider profit generally, on a case by case basis, would deny ITA the opportunity to gain the requisite experience and study required to determine whether the adoption of a rule such as the 80% rule would be advisable.

[13] In this case, with the exception of the sales claimed to be out of the ordinary course of trade, all of Sonco's sales of OCTG to unrelated purchasers in the U.S. involved pipe which had been threaded and coupled i the U.S.

[14] Plaintiff makes two additional arguments concerning ITA's deduction of profit. First, plaintiff argues that ITA used an arbitrary methodology for calculating profit. Specifically, plaintiff challenges ITA's use of imputed profit figures derived from U.S. manufacturing costs and U.S. prices. Plaintiff claims ITA should have instead used "actual" profit information which it could have verified. Plaintiff's Brief at 54 n.10. The Court finds that ITA's methodology, based on actual cost and price data, sufficiently reflects the company's actual experience and is reasonable.

Second, plaintiff argues that deducting profit attributable to further processing from E.S.P. may distort ITA's fair value comparison in certain factual situations not present in this case. *See* Plaintiff's Brief at 56–58. The Court prefers to address any such distortion, if indeed it can be characterized as such, when those factual situations are before the Court.

V. ITA's Correction of Clerical Errors

Plaintiff finally claims that ITA's final determination and amended final determination contain three clerical errors which inflate Sonco's dumping margin. Specifically, plaintiff claims that (1) ITA double counted Sonco's scrap costs, (2) ITA double counted certain of Sonco's shipping labor costs and (3) ITA miscalculated Sonco's home market credit expenses in the amended final determination.

(1) Double Counting of Scrap Costs

Plaintiff claims that by allocating an amount for total scrap costs to both prime and secondary (limited service) products, ITA has double counted the actual scrap cost associated with Sonco's OCTG production thereby increasing Sonco's dumping margin.

As the question of whether ITA has properly allocated scrap costs between prime and limited service OCTG cannot be answered until the Court has further examined the basis for ITA's decision to treat limited service OCTG as co-product and not as a by-product of prime, final resolution of this matter must await the results of the remand.[15]

(2) Double Counting of Shipping Labor Costs

Plaintiff claims that ITA double counted certain of Sonco's shipping labor costs by including these costs in both the overhead and direct labor portions of Sonco's cost of production in both the original and amended final determination. According to plaintiff, Sonco included certain shipping labor costs in its calculation of direct labor costs. In a subsequent submission to a ITA, Sonco reclassified its shipping labor costs as packing costs. In the final determination, ITA disallowed this reallocation of costs and adjusted Sonco's submitted packing costs by subtracting from it the amount for shipping labor costs. ITA then added to the overhead portion of Sonco's manufacturing cost the amount for shipping labor costs. In its calculation of direct labor costs, however, ITA erroneously used Sonco's originally submitted direct labor costs, which included shipping labor costs. The effect of this error was the double counting of shipping labor costs in both overhead and direct labor costs.

Defendant does not dispute this chronology of events and admits that such a mistake was made in the original final determination, but argues that it was corrected in the amended determination. Plaintiff denies that any correction was made and asks the Court to remand this issue unless defendant can show the court evidence of record indicating that this acknowledged error was, indeed, corrected.

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[15] In addition, there appears to be considerable confusion among the parties as to exactly how ITA has allocated scrap costs to prime and limited service OCTG. Plaintiff seems to believe that ITA allocated to the prime product a total scrap cost based on data submitted by Sonco and verified by ITA and then allocated an additional "estimated scrap cost" to limited service OCTG. Defendant claims that ITA did not utilize the scrap costs submitted by Sonco because of discrepancies found in the data and allocated estimated scrap costs to both prime and limited service pipe. Because the citations to the record provided by both parties are not particularly helpful in resolving this confusion, an explanation of ITA's methodology here would be appropriate.

Upon reviewing the record, the Court concludes that this error has been corrected in the amended final determination. *See* Sonco/Benmit Cost of Production Verification Exhibit C24, at 524A, 530A and 539A.

(3) Home Market Credit Expenses

It is undisputed that in the original determination ITA erroneously concluded that Sonco's home market and U.S. credit expenses were the same, requiring no adjustment. Plaintiff argues that when ITA recalculated Sonco's home market credit expenses in the amended final determination, it calculated those expenses on the basis of an incorrect credit period contrary to one which had been verified by ITA, thereby inflating Sonco's dumping margin.[16] Plaintiff cites certain portions of an ITA computer printout, Confidential Amended Record Document Number (Amend. CR) 10, at 250A and 258A, in support of this claim. Defendant, citing the same computer printout at 250A and Sonco/Benmit Cost of Production Verification Exhibit C24, at 537A argues that the record demonstrates that ITA utilized the correct credit period in its calculations.

After a thorough examination of the record, it appears that ITA used the verified credit period, rather than the incorrect period cited by plaintiff.[17] *See* Sonco/Benmit Cost of Production Verification Exhibit C24, at 537A, 539A.

Conclusion

This determination is remanded for reconsideration consistent with this opinion. A new determination is to be issued within 45 days. If any party wishes to challenge the determination it shall confer with opposing counsel and submit a briefing schedule within 10 days of the determination on remand.

So ordered.

(Slip Op. 88-110)

RSI (India) Pvt., Ltyd., et al., plaintiffs *v.* United States, defendant, and Pinkerton Foundry, Inc., et al., defendant-intervenors

Court No. 87-01-00086

[16] Plaintiff had initially argued that ITA erred in using a specific incorrect period, instead of the verified period. Subsequently, plaintiff argued more generally that ITA based its calculations on something other than the verified period. This argument was supported by calculations which plaintiff made, attempting to replicate ITA's calculations, but arriving at different figures.

[17] Plaintiff's failure to arrive at the same results as ITA apparently resulted from its use of different figures in its calculation. ITA's method of calculating home market credit expenses involved three basic factors: selling price, time period, and interest rate. In seeking to replicate ITA's calculation, plaintiff used different selling prices and exchange rates than ITA had used, and therefore, it was unable to match ITA's final results by using the verified period at issue. *Compare* Supplemental Brief of Sonco, at Attachments A & B *with* Sonco/Benmit Cost of Production Verification Exhibit C24, at 537A (initial ITA calculation), 539A (revised underlying cost figures), 542A (applicable exchange rate) *and* Amend CR 10, at 250A (resulting home market credit expenses). Plaintiff has not challenged ITA's choice of selling price figures or exchange rates.

Before DICARLO, *Judge*.

[Remand results affirmed and action dismissed.]

(Decided August 22, 1988)

Brownstein, Zeidman & Schomer (*Irwin P. Altschuler, Denise T. DePersio, David R. Amerine*, and *Ronald M. Wisla*), and *Kaplan, Russin & Vecchi* (*Dennis James, Jr.* and *Kathleen Patterson*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, United States Department of Justice (*Elizabeth C. Seastrum*); United States Department of Commerce (*Mark J. Sadoff*) for defendant.

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal, Carol A. Mitchell* and *Robin H. Beeckman*) for defendant-interveners.

DICARLO, *Judge*: After reviewing a challenge to an administrative review of the International Trade Administration of the United States Department of Commerce (Commerce) in *Certain Iron-Metal Construction Castings From India; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 45,788 (Dec. 22, 1986), the Court approved Commerce's methodology in constructing an interest rate benchmark for short-term packing credit loans made to exporters at preferential rates of interest, and affirmed Commerce's determination to countervail the entire amount of International Price Reimbursement Scheme (IPRS) payments made under a government subsidy program for pig iron. *RSI (India) Pvt., Ltd.* v. *United States*, 12 CIT ——, Slip Op. 88–49 (Apr. 27, 1988), *rehearing denied*, 12 CIT ——, Slip Op. 88–83 (June 30, 1988). However, the Court also found Commerce to have overstated the net ad valorem benefit of IPRS payments to one exporter, RSI (India) Pvt. Ltd., by allocating RSI's IPRS payments for all castings over exports of only those castings under investigation, rather than allocating RSI's IPRS payments for all castings over exports of all castings. The Court remanded for Commerce to recalculate the net ad valorem benefit for RSI using the export value of all castings to all markets, and to recalculate the weighted average country wide rate in light of the changed benefit for RSI

DISCUSSION

Commerce has submitted its recalculations to the Court, and neither the domestic producers nor the Indian manufacturers have voiced any objection to the remand results. In the remand determination, Commerce divided the total IPRS benefit received by RSI for all castings by the total value of all castings exported to all markets. The new denominator is a verified figure. *See* Conf. R. Supp. Ex. B2. From recalculating RSI's net benefit from this program, Commerce now finds the weighted-average rate for the IPRS is 6.54 percent ad valorem and the new country-wide weight-average rate from all programs for both assessment and duty deposit purposes is 7.31 percent ad valorem.

CONCLUSION

Having reviewed the confidential record, the Court finds that Commerce's remand results conform to the instructions in *RSI (India) Pvt., Ltd.* v. *United States,* 12 CIT ——, Slip Op. 88–49 (Apr. 27, 1988), *rehearing denied,* 12 CIT ——, Slip Op. 88–83 (June 30, 1988), are supported by substantial evidence on the record, and are according to law. The Court affirms Commerce's remand determination and dismisses this action.

(Slip Op. 88–111)

TOHO TITANIUM CO., LTD., PLAINTIFF *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND RMI CO. AND TITANIUM METALS CORP. OF AMERICA, INTERVENORS

Court No. 85–1–00024

Before DICARLO, *Judge.*

Following a second remand, Commerce's explanation of its determination to use constructed value rather than home market sales as the basis for determining foreign market value in an antidumping determination is supported by substantial evidence and is in accordance with law.

[The action is dismissed.]

(Decided August 24, 1988)

Graham & James (Denis H. Oyakawa, James H. Broderick, Jr. and *Patrick J. Fields)* for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Sheila N. Ziff*); *Lisa B. Koteen,* Office of the Deputy Chief Counsel for Import Administration, United States Department of Commerce, for defendants.

Wilmer, Cutler & Pickering (A. Douglas Melamed, John D. Greenwald and *Deborah M. Levy*); *John F. Hornbostel, Jr.,* RMI Company, for intervener RMI Company.

Pillsbury, Madison & Sutro (Donald E. deKieffer and *Francis J. Sailer*); *Frederick W. Steinberg,* Titanium Metals Corporation of America, for intervenor Titanium Metals Corporation of America.

DICARLO, *Judge:* This action is before the Court following a second remand to the International Trade Administration of the United States Department of Commerce (Commerce). The Court now affirms Commerce's use of constructed value, rather than home market sales, as the foreign market value that was compared to the United States price to determine that Japanese titanium sponge is sold in the United States at less than fair value.

BACKGROUND

Under the Tariff Act of 1930, as amended, dumping margins are measured by calculating the amount by which foreign market value

exceeds the United States price of the same or similar merchandise. 19 U.S.C. § 1673 (1982 & Supp. IV 1986). Under section 773(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(b) (1982), Commerce may not disregard home market sales at less than the cost of production in determining foreign market value unless it determines that those sales "are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade * * *."

Toho Titanium Company, Ltd. (Toho), a Japanese exporter of titanium sponge, challenged Commerce's determination to disregard home market sales in Japan in favor of a constructed value to represent foreign market value in determining that titanium sponge from Japan is being sold in the United States at less than fair value. *See Titanium Sponge From Japan: Final Determination of Sales at Less Than Fair Value,* 49 Fed. Reg. 38,687 (Oct. 1, 1984).

Toho I affirmed Commerce's finding that substantial amounts of Japanese titanium sponge were sold over an extended period below the cost of production, but remanded for Commerce to explain why Toho's sales below the cost of production are not at prices which would allow recovery of all costs within a reasonable period in the normal course of trade. *Toho Titanium Co.* v. *United States,* 11 CIT ——, 657 F. Supp. 1280 (1987).

Toho II rejected the remand results because they did not sufficiently explain Commerce's finding that Toho could not recover costs over a reasonable period in the normal course of trade from sales at the prices charged during the investigatory period. *Toho Titanium Co.* v. *United States,* 11 CIT ——, 670 F. Supp. 1019 (1987).

Discussion

The Court's concern in *Toho I* and *Toho II* was that Commerce had failed to adequately address the possibility that Toho might justify a loss over an extended period if Toho reasonably expected production costs to decrease because of more efficient production and the averaging of initial investment costs over time. Confronted with a similar issue in *Timken Co.* v. *United States,* 11 CIT ——, 673 F. Supp. 495, 516 (1987), the Court stated:

> that in order to determine whether costs will eventually be recovered by sales at below-cost prices, it is necessary to consider factors such as how far below cost the sales are; how much, if at all, costs of production are expected to decline; and the period of time over which they are expected to decline.

In the second remand results, Commerce has explained the various factors which comprise Toho's computed cost of production of titanium sponge. Many costs incurred during the period of investigation which would benefit Toho in the future were not included in the cost of production, such as costs stemming from efforts to increase raw material, work-in-process and finished goods inventories, and costs of prepaying consumption taxes and insurance. Other

costs that Toho incurred were allocated over a period beyond the period of investigation, such as costs of machinery and equipment (depreciated over 7 years), buildings (depreciated over 30 years), and major maintenance expenses (depreciated over remaining useful life of the repaired equipment or machinery).

An effect of computing the cost of production in this manner is to normalize the cost of production over time. The review period cost of production reflects the averaging of some initial start-up costs, or in the case of Toho, which was already producing titanium sponge, the averaging over time of several one-time major expenditures such as machinery and building purchases. It also normalizes certain preparation expenditures, such as various increased inventory costs or insurance and consumption tax prepayments, which were properly deferred to future production as inapplicable to the investigatory period. This calculation of cost of production does not necessarily capture other extraordinary costs incurred during the review period which could distort the normal cost of production and ignores the possibility of more efficient production in the future.

In submitting its cost of production data, Toho identified certain extraordinary costs, including costs associated with idling, discontinuing and starting-up certain facilities, surplus personnel, and research and development (R & D). Commerce disallowed any adjustment for these extraordinary expenses in computing the cost of production. Toho did not challenge Commerce's decision to disallow these adjustments.

During the second remand, Commerce included these extraordinary costs to construct a cost of production. Commerce characterized these costs associated with start-up, low production levels, and unused capacity as "efficiency" costs and the hypothetical cost of production as representative of what Toho's costs would be if it had been efficiently using its production facilities. *See Results of Second Remand Proceeding,* 10–14. *See also* Attachment I, *Memo for Titanium Sponge Team from Director, Office of Policy,* 2 (Dec. 30, 1987); Second Remand R. Doc. 1, 1–2; Second Remand R. Doc. 2, 4–5; Conf. R. Doc. 52, 5–7. Commerce then compared this hypothetical cost of production with the investigatory sales prices and found that all but one sale were made at prices below the hypothetical cost of production.

Commerce allocated Toho's R & D costs in constructing the hypothetical cost of production in a manner similar to new equipment and new building costs. Commerce allocates R & D expenses associated with the investigated article's production over the number of years the product will be produced or on the basis of the number of units to be produced. This avoids the problems associated with projects having large research and development costs, that could not be recovered in the first year or two of sales, such as the commercial aircraft example provided in the legislative history of 19 U.S.C. § 1677b(b) (1982), *see* S. Rep. No. 1298, 93rd Cong., 2d Sess.

173 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7310; H.R. Rep. No. 571, 93rd Cong., 1st Sess. 71 (1973), and highlighted by the Court in *Toho I*, 11 CIT at ——, 657 F. Supp. at 1286, and *Toho II*, 11 CIT at ——, 670 F. Supp. at 1021.

Toho challenges Commerce's attempt to normalize the cost of production, arguing that its submission of the extraordinary costs data was not for purposes of projecting future production costs. Toho's intention in submitting the data, however, does not dictate how the data may be used. Commerce may use reliable data in the record for proper purposes it finds necessary in administering the law, subject to judicial review to assess whether Commerce's determinations are supported by substantial evidence and according to law.

Toho claims several other factors affect future production costs and argues Commerce's attempt to normalize a cost of production is a poor projection. The Court agrees that many factors can decrease future cost of production, including decreases in production material prices, increases in a factory's capacity utilization, changes in the tax rate, or even lower labor pay scales. Additionally, through other factors such as technological advances, managerial streamlining, and even a production worker suggestion box, a company will naturally learn how to make its operations more efficient and thereby decrease its costs of production. Commerce admits the inherent difficulties in projecting a future cost of production because of the many unknown variables. For this action, however, the Court finds it reasonable for Commerce to rely on Toho's candid responses on its expected declines in future production costs as a reliable gauge of the expected effect of more efficient manufacturing.

Commerce also considered anticipated future sales, which would increase Toho's capacity utilization and decrease its unit cost of production. Defendant states:

> Toho has never alleged that it "expected" sales to increase and there is no evidence on the record that its sales might increase. Manifestly, in the absence of evidence, or even a claim, as to increased future sales, Commerce is precluded from making an affirmative determination that, in the future, Toho might have either a higher volume of sales or sales of larger quantities of titanium sponge.

Defendant's Reply to Plaintiff's Response to Results of Second Remand, at 9. In the absence of any indication that Toho anticipated a change in sales that would permit it to recover its costs over a reasonable period of time in the normal course of trade, the Court finds it reasonable for Commerce to focus in the second remand results upon whether costs would become lower in making a determination as to production cost recovery.

Since Toho's costs of production, including extraordinary costs, remains below the investigatory sales prices in all but one instance, it is unlikely that Toho will be able to recover its costs in any reasonable period of time. Based upon the evidence in this record, Com-

merce did not need to define "a reasonable period" for Toho to recover costs in the normal course of trade. The Court still cautions that in the absence of formal rulemaking procedures, *see Carlisle Tire & Rubber Co.* v. *United States,* 10 CIT ——, 634 F. Supp. 419, 423 (1986), Commerce should not assume as a matter of department practice that a company cannot recoup its costs in a reasonable period even where 100% of home market sales over the investigatory period are made below cost. *Toho II,* 11 CIT at ——, 670 F. Supp. at 1021.

Conclusion

The Court finds there is substantial evidence in the record as a whole to support Commerce's determination that Toho could not recoup its costs over any reasonable period of time in the normal course of trade from sales made at the prices charged during the investigatory period. Having reviewed Commerce's remand results and the comments of all interested parties, the Court finds Commerce's determination under 19 U.S.C. § 1677b(b) (1982) to use constructed value rather than home market sales to represent foreign market value to be supported by substantial evidence on the record as a whole and according to law. The action is dismissed.

(Slip Op. 88–112)

PPG Industries, Inc. and Cabot Corp., plaintiffs *v.* United States, defendant, Vitro Flex, S.A. and Cristales Inastillables de Mexico, S.A., and Hules Mexicanos, S.A., and Negro de Humo, Negromex, S.A., defendant-intervenors, and Landrillera Monterrey, S.A., and Laminados de Barra, S.A., amici curiae

Court No. 87–11–01065

Before Carman, *Judge.*

[Defendant's motion to dismiss granted.]

(Decided August 25, 1988)

Stewart and Stewart, (Eugene L. Stewart, Terence Stewart, David Scott Nance, and *Lance S. Hurewitz),* for the plaintiffs.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Platte B. Moring, III*), for the defendant.

Brownstein, Zeidman and Schomer, (*Irwin P. Altschuler* and *David R. Amerine*), for defendant-intervenors, Vitro Flex, et al.

O'Connor & Hannon, (*Andrew Jaxa-Debicki*), for the defendant-intervenors, Hules Mexicanos, et al.

Duncan, Allen and Mitchell, (*Leslie Alan Glick* and *John P. Williams*), for amici curiae.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* Defendant files this motion to dismiss for lack of jurisdiction based upon the following claims: (1) plaintiffs have filed their action pursuant to 28 U.S.C. § 1581(i) when the remedy provided under 28 U.S.C. § 1581(c) is manifestly adequate; (2) plaintiffs have also filed their action pursuant to 5 U.S.C. §§ 701–706 and 28 U.S.C. § 2201(a) which do not confer independent grants of jurisdiction upon this Court; (3) no real case or controversy exists; (4) plaintiffs appear to be seeking an advisory opinion: and (5) plaintiffs do not possess standing to institute this action. Defendant-intervenors and amici curiae support the motion while plaintiffs oppose it. Upon consideration and review of the motion and all relevant papers filed therein, the Court grants defendant's motion to dismiss this action.

FACTS

PPG Industries, Inc. (PPG) and Cabot Corporation (Cabot), (hereinafter collectively referred to as plaintiffs) are United States producers of, *inter alia*, fabricated automotive glass and carbon black, respectively. Both of these products are also produced in Mexico and imported into the United States free of ordinary Customs duties.

The Mexican merchandise, though, is subject to countervailing duties pursuant to § 303(a)(2), as amended, 19 U.S.C. § 1303(a)(2), and § 701, as amended, 19 U.S.C. § 1671, of the Tariff Act of 1930 (the Act).

Section 1303(a)(2) requires that any non-dutiable goods entering the United "States from a country not" under the Agreement, pursuant to § 1671, are subject to imposition of countervailing duties without the requirement of an injury determination from the International Trade Commission (ITC)." Under the Agreement" refers to a country which has acceded to the General Agreement on Tariffs and Trade, (GATT), or has entered into a substantially equivalent agreement with the United States. *See* 19 U.S.C. § 1671(b); *Cementos Anahuac del Golfo, S.A.* v. *United States,*—— CIT ——, Slip Op. 88–75 (June 9, 1988; *appeal docketed,* No. 88–1476 (Fed. Cir. June 17, 1988).

On June 27, 1983, the United States Department of Commerce, International Trade Administration, (ITA), published a countervailing duty order, (CVD order), pursuant to § 1303, covering manufacturers, producers, or exporters of carbon black from Mexico. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Black From Mexico,* 48 Fed. Reg. 29,564 (1983). No injury determination was required because Mexico was not a country "under the Agreement" at that time. The ITA conducted successive administrative reviews on this CVD order pursuant to section 751 of the Act, as amended, 19 U.S.C. § 1675 (751 re-

view). The first 751 review covered the period of importation from April 8, 1983 to September 30, 1983. The second 751 review is still being conducted. It covers the period from October 1, 1983 through December 31, 1985. The third 751 review is also being conducted by the ITA. It covers the calendar year of 1986.

On January 14, 1985, the ITA published a CVD order pursuant to § 1303, covering the manufacturers, producers, or exporters of fabricated automotive glass from Mexico. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Fabricated Automotive Glass From Mexico;* 50 Fed. Reg. 1906 (1985). Because Mexico was not a "country under the Agreement", the CVD order was issued without an injury determination pursuant to § 1303. Successive 751 reviews of the CVD order were conducted by the ITA. The first 751 review covered the period of importation from October 24, 1984 through December 31, 1985. The ITA is in the process of conducting the second 751 review for the period of importation covering the calendar year 1986.

On August 24, 1986, Mexico acceded to the GATT. Shortly thereafter the Mexican government and various petitioners, whose Mexican goods were subject to CVD orders without the benefit of an injury determination, filed requests with the ITA to revoke the CVD orders covering those goods subject to the order. Since Mexico had become a member of the GATT, the petitioners argued, those products were now entitled to an injury determination before countervailing duties could be assessed and imposed. Because those injury determinations had not been conducted, the petitioners reasoned no countervailing duties could be imposed; the CVD orders were invalid; and, therefore, the CVD orders needed to be revoked. These requests were also renewed during the various ongoing proceedings of the 751 reviews.

PPG, during one of the 751 review proceedings, responded to the above arguments that neither the GATT nor the countervailing duty law requires an injury determination be issued on Mexican goods covered by an existent CVD order upon the accession of Mexico to the GATT. PPG further argued that Mexico's GATT accession did not activate a retroactive benefit of an injury determination to outstanding CVD orders. Revocation, PPG contended, was not warranted in this situation and would run contrary to U.S. law and the GATT. *Fabricated Automotive Glass From Mexico; Final Results of Countervailing Duty Administrative Review,* 51 Fed. Reg. 44,652, 44,654 (1986).

The ITA responded to this argument as follows:

> We are currently considering the issue of whether Mexico's accession to the GATT impinges on our authority to impose countervailing duties on duty-free products from Mexico. Since Mexico's accession became effective on August 24, 1986, our decision will affect entries covered by this review, which runs through December 31, 1985.

51 Fed Reg. at 44,655. This statement by the ITA was published in similar form in response to similar arguments raised in other 751 review proceedings covering other products from Mexico. *See Bricks From Mexico; Final Results of Countervailing Duty Administrative Review,* 51 Fed. Reg. 43,418, 43,420 (1986); *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review,* 51 Fed. Reg. 44,500, 44,501 (1986).

On December 26, 1986, Gilbert Kaplan, Deputy Assistant Secretary of Import Administration, ITA, wrote a letter to Alan Holmer, General Counsel of the Office of the United States Trade Representative, (USTR), requesting a legal opinion on the issue of injury determinations being required retroactively on outstanding CVD orders upon the accession of Mexico to the GATT. Exhibit 1, Defendant's Motion to Dismiss, *PPG Industries, Inc.* v. *United States,* Court No. 87-11-01065. On May 28, 1987, the USTR responded to the request with an internal memorandum addressed to Ambassador Yeutter, U.S. Trade Representative, from Alan Homer, General Counsel of the USTR office. The memorandum recommends "the U.S. is under an international obligation to provide an injury test to duty-free Mexican merchandise covered by existing CVD orders." Collective Exhibit 12, Plaintiffs' Complaint.

On February 23, 1987, the ITA published a notice of initiation of its 751 review of the CVD order covering fabricated automotive glass for the importation period of January 1, 1986 through December 31, 1986. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 52 Fed. Reg. 5,479 (1987). On July 17, 1987, the ITA published a similar notice of initiation with respect to a CVD order covering carbon black from Mexico for the period January 1, 1986 through December 31, 1986. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 52 Fed. Reg. 27,036, 27,037 (1987).

On October 15, 1987, the ITA communicated with the ITC by letter from Gilbert B. Kaplan, Acting Assistant Secretary for Import Administration, U.S. Department of Commerce, to Susan Liebler, Chairperson, ITC. *See* Exhibit 12, Plaintiff's Complaint. It is the contents of this communication that is the focus of plaintiffs' claim. The letter is set forth, in full, as follows:

> Dear Chairman [sic] Liebler:
>
> I am writing to request that the International Trade Commission (ITC) conduct investigations into the occurrence of material injury, or treat thereof, from certain duty-free imports from Mexico. We have determined that Mexico's accession to the General Agreement on Tariffs and Trade (GATT), which became effective on August 24, 1986, entitles it to an affirmative injury determination prior to the levy of countervailing duties on duty-free merchandise entering the Untied States after August 24, 1986. This determination, arrived at following consul-

tations with the Office of the United States Trade Representative (USTR), affects products currently covered by nine countervailing duty orders. The products covered are: (1) fabricated automotive glass; (2) bricks; (3) carbon black; (4) cement; (5) iron construction castings; (6) lime; (7) litharge; (8) polypropylene film; and, (9) toy balloons.

Attached for your review is a memorandum recently prepared by Alan Holmer, General Counsel at USTR. It concludes that the United States has an obligation, pursuant to Article VI of the GATT, to make an affirmative injury determination before countervailing duties may be levied on Mexican duty-free imports entered after August 24, 1986.

At the time the Mexican orders were issued, Mexico was not a member of the GATT and, therefore, was not entitled to an injury test under the applicable statutory provision, section 303(a)(2) of the Tariff Act of 1930, as amended.

It has been our position since *Certain Fasteners from India; Final results of Administrative Review and Partial Revocation of Countervailing Duty Order,* 47 Fed. Reg. 44129 (October 6, 1982) and more recently in *Carbon Steel Wire Rod from Trinidad and Tobago; Preliminary Results of Administrative Review and Tentative determination to Revoke Countervailing Duty Order,* 50 Fed. Reg. 19561 (May 9, 1985), that where applicable international obligations exist, Congress intended to subject outstanding countervailing duty orders to the injury requirements of section 303(a)(2). Therefore, we believe the United States is prohibited from levying countervailing duties on Mexican duty-free imports if there has not been an affirmative injury determination by the ITC. Moreover, in the absence of such a determination, we believe ITA is compelled by our international obligations and the requirement of U.S. law to give serious consideration to the revocation of any orders so affected. Revocation would of course mean that many domestic industries would be forced to incur the expense of bringing entirely new cases on these products and perhaps more importantly, it would eliminate any possibility of assessing countervailing duties on thousands of entries.

Under these circumstances, we believe, as does USTR, that an injury test should be granted. We also believe that the ITC has several legal bases upon which to determine whether the requisite injury would occur should these orders be revoked. I have attached a memorandum prepared by my chief counsel's office outlining our views.

Over the past several months, I have been in frequent contact with your General Counsel's office concerning this issue. I am keenly aware of the practical difficulties, both for the Commission and the ITA, that my request raises. However, I welcome your suggestions and stand ready to work with the Commission to resolve the issues that confront us.

Id. (The Letter).

The Letter was transmitted from the ITA to the ITC on or around October 20, 1987, but was not placed in the public files on the 751

review proceedings until November 3, 1987. Plaintiffs filed this action on November 4, 1987.

Plaintiffs charge the letter constitutes a "determination" by the ITA. This determination, plaintiffs contend, was made without a hearing or without the chance to submit comments or briefs in any of the affected 751 reviews. Specifically plaintiffs contend:

> 30. The ITA's determination constitutes a rule within the meaning of 5 U.S.C. § 551(4). Before promulgating a rule, the ITA is required to follow the procedures enumerated in 5 U.S.C. § 553, which requires that the agency provide public notice of the proposed rule making and provide an opportunity for interested persons to submit written data, views or arguments. The agency shall give consideration to the comments presented.
>
> 31. As the ITA followed none of the required procedures, the ITA's determination was made without observance of the procedures required by law, and is thus unlawful within the meaning of 5 U.S.C. § 706(2)(D).
>
> 32. The ITA's determination constituted an aspect of a final determination within the context of an administrative review. The relevant statute, 19 U.S.C. § 1671b *et seq.*, requires that the ITA make a final determination only after publishing a preliminary determination and providing the parties to the review with an opportunity to submit briefs and participate in a hearing regarding the issue.
>
> 33. As the ITA followed none of the required procedures, the ITA's determination was made without observance to the procedures required by law, and is thus unlawful within the meaning 5 U.S.C. § 706(2)(D).
>
> 34. Because the ITA did not follow the necessary procedures in making its determination, it had no authority to request the ITA to conduct an injury investigation of duty-free products from Mexico.
>
> 35. The ITA's determination that no countervailing duty can be imposed upon imports of duty-free products from Mexico entering the United States after August 24, 1986, without an affirmative determination of injury by the ITC, is contrary to law.

Plaintiffs' Complaint at 9–10.

Discussion

Defendant Government (defendant) moves to dismiss this action for lack of jurisdiction. Specifically, defendant claims because adequate remedies lie under 28 U.S.C. 151(c), plaintiffs have not sustained their burden of establishing sufficient grounds exist for bringing the action under 28 U.S.C. 1581(i). In addition, defendant claims the two other statutes plaintiffs refer to for jurisdictional grounds, 5 U.S.C. §§ 701–706 and 28 U.S.C. § 2701(a), do not grant independent bases for jurisdiction upon the Court. Defendant also urges no real case or controversy exists at this time; any opinion on the merits by the Court would be advisory at best; and plaintiffs

lack standing to institute the present action. The Court must first direct its attention to the jurisdictional arguments challenging the Court's ability to review the matter.

Plaintiffs, in their complaint, state their action is brought pursuant to 5 U.S.C. §§ 701–706, 28 U.S.C. § 1581(i)(2), and 28 U.S.C. § 2201(a). Defendant challenges plaintiffs' claimed jurisdiction basis arguing that neither 5 U.S.C. §§ 701–706 of the Administrative Procedure Act (APA) nor 28 U.S.C. § 2201(a), providing for federal Courts to issue declaratory judgments, establish an independent grant of jurisdiction to the Court to review the subject matter of the action. Defendant stresses that these statutes must work in conjunction with 28 U.S.C. § 1581, which provides for the exclusive jurisdiction of this Court over specific types of civil actions.

Defendant's points, supported by defendant-intervenors, are well taken. It has been noted by the Supreme Court that "the APA does not afford an implied grant of subject matter jurisdiction permitting federal judicial review of agency action." *Califano* v. *Sanders*, 430 U.S. 99, 107 (1977). Specifically, the Supreme Court observed that while 5 U.S.C. § 702 sets forth that affected persons have a right to judicial review of wrongful agency actions, "§ 703 suggests that this language was not intended as an independent jurisdictional foundation, since such judicial review is to proceed "in a Court specified by statute' or "in a court of competent jurisdiction.' " *Id.* at 106 n.6.

Furthermore, 28 U.S.C. § 2201(a) creates a right for any court of the United States to declare the rights of parties so seeking where the actual controversy is within the Court's jurisdiction. Neither the APA under § 701 *et seq.* nor § 2201 are designed to grant an independent basis for jurisdiction to this Court. Rather, both sections provide for additional remedies where jurisdiction has already been confirmed by statute. *See First Nat. Bank of Scotia* v. *United States*, 530 F. Supp. 162, 167–68 (D.C. D.C. 1982), *aff'd*, 659 F.2d 1059 (2nd Cir. 1982).

Plaintiffs allege the Court has jurisdiction under 28 U.S.C. § 1581(i) to review this action. It is established law, though, § 1581(i) jurisdiction may only be invoked where jurisdiction under another subsection of § 1581 is unavailable or the remedy provided under the other subsection is manifestly inadequate. *Miller & Co.* v. *United States*, 824 F.2d 961 (Fed. Cir. 1987); *United States* v. *Uniroyal, Inc.*, 687 F.2d 467 (Fed. Cir. 1982). In either circumstance, it is the burden of plaintiffs to establish their jurisdiction under § 1581(i). If a remedy exists under another subsection of § 1581, plaintiffs must show why the available remedy under that other subsection is manifestly inadequate. *Miller & Co.*, 824 F.2d at 963.

Defendant and defendant-intervenors claim plaintiffs have not met their burden in establishing the Court has jurisdiction under § 1581(i). To the contrary, argues defendant, a proper and adequate remedy lies under 28 U.S.A. § 1581(c) and 19 U.S.C. § 1516a(b).

Plaintiffs' challenge of a transmittal of a letter from the ITA to the ITC which did not constitute, or result in, any form of a "determination" is not a reviewable determination, argues defendant, and is only reviewable once the final determination encompassing this action has been issued presumably under § 1581(c).

The Court agrees with defendant. It would seem that an adequate remedy would lie under § 1581(c). Plaintiffs have not met their burden to establish that remedy is manifestly inadequate. *Miller & Co.*, 824 F.2d at 963.

Plaintiffs, in their opposition papers, devote much discussion to cases where the Court has found jurisdiction lies under § 1581(i). While the Court recognizes the precedential value of these cases in situations germane to those cases, it is clear none of those fact patterns are apposite to the case at hand. Plaintiffs summarily conclude their discourse with a conclusory paragraph stating the facts of the enumerated cases are analogous to the instant action, and that the ITA "[h]aving failed to make this determination inside the administrative review process [establishes] the judicial review provisions of 28 U.S.C. § 1581(c) do not control." Plaintiff's [sic] Opposition to Defendant's Motion to Dismiss at 59. The Court disagrees.

The Court has jurisdiction, pursuant to 28 U.S.C. § 1581(c), over civil actions challenging judicially reviewable determinations set forth at 19 U.S.C. § 1516a. Section 1516a(a)(2) provides, in pertinent part:

> (2) Review of determinations on record
>
> **(A) In general.**—Within thirty days after—
>
> (i) the date of publication in the Federal Register of—
>
> (I) notice of an determination described in clause (ii), (iii), (iv), or (v) of subparagraph B, or
> (II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or
>
> (ii) the date of mailing of a determination described in clause (vi) of subparagraph (B),
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.
>
> **(B) Reviewable determinations.**—The determinations which may be contested under subparagraph (A) are as follows:
>
> *   *   *   *   *   *   *
>
> (iii) A final determination, other than a determination reviewable under paragraph (1), by the administering

authority or the Commission under section 1675 of this title.

19 U.S.C. § 1516(a)(2) (1987).

Plaintiffs contend § 1516a(a)(2)(B)(iii) is not the jurisdictional ground for its action because The Letter that was transmitted, and "determination" therein, was not a part of the administrative 751 review and could not be challenged as such. Plaintiffs also have described the possible harm they would incur in the following manner: "Insofar as the ITA's determination and action *could lead* to the revocation of the countervailing duty orders covering automotive glass and carbon black from Mexico, PPG and Cabot are persons aggrieved by agency action * * *." Plaintiffs' Complaint at 2 (emphasis added).

Plaintiffs' reference to any injury incurred is the possibility the transmittal of The Letter "could lead" to action by the ITA or the ITC that might result in some financial harm or other detriment. These injurious actions would appear to be purely conjectural and would become part of the record reviewable by the Court when the 751 review results are completed and issued. Section 1581(c) provides an adequate remedy for any possible harm that might be incurred by plaintiff and provides a possible channel for plaintiff to challenge the ITA's action at issue if such action results in actionable harm to plaintiffs.

The transmittal of The Letter from the ITA to the ITC on October 15, 1987 was done within the context of a 751 review. The question whether or not the letter constitutes a determination is beyond the question of whether or not § 1581(c) provides an adequate remedy for plaintiffs. The question presumably could be raised under § 1581(c) when there is a final determination. The letter was entered into the record and any impropriety on behalf of the ITA is reviewable by the Court within any challenge to the final 751 review results determination.

Conclusion

Accordingly, the Court finds it lacks jurisdiction to hear this action pursuant to § 1581(i) at this juncture of the proceedings. When the proceedings are ripe for judicial review, presumably § 1581(c) will provide plaintiffs with a proper remedy for the Court to consider on review. Since plaintiffs have not shown the remedy under § 1581(c) is manifestly inadequate, they have failed to establish standing to invoke the jurisdiction of the Court under § 1581(c). Defendant's motion to dismiss is granted.

The Court's order will be entered accordingly.

(Slip Op. 88–113)

NATIONAL ASSOCIATION OF MIRROR MANUFACTURERS, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SOLAGLASS COVENTRY, LTD., SUN MIRROR, HI MIRROR, MIE GLASS, MITSUBISHI INTERNATIONAL CORP., MITSUI AND CO., U.S.A., INC., ORIENT GLASS CO., SENTINEL ENTERPRISES, INC., DEFENDANT-INTERVENORS, AND GLAVERBEL S.A., DEFENDANT-INTERVENOR

Consolidated Court No. 87–04–00592

Before DICARLO, *Judge.*

Determinations of the United States International Trade Commission that a United States industry was not materially injured nor threatened with material injury by reason of less than fair value imports of unfinished mirrors from Belgium, the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom are according to law and supported by substantial evidence. Two Commissioners' additional views that even if the domestic industry was injured, it was not by reason of the less than fair value imports, do not affect the validity of the determinations that there is no material injury or threat of material injury to a domestic industry.

[Judgment for defendant.]

(Decided August 25, 1988)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.,* and *Geert De Prest*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jeanne E. Davidson*); United States International Trade Commission (*Paul R. Bardos*), for defendant.

Brownstein, Zeidman and Schomer (*Irwin P. Altschuler, Steven P. Kersner, David R. Amerine,* and *Donald S. Stein*), for defendant-intervenors Solaglass Coventry, Ltd., Sun Mirror, Hi Mirror, Mie Glass, Mitsubishi International Corp., Mitsui and Co., USA, Inc., Orient Glass Co., and Sentinel Enterprises, Inc.

Ulmer, Berne, Laronge, Glickman and *Curtis* (*Morton L. Stone, Ronald H. Isroff,* and *Peter A. Rome*) for defendant-intervenor Glaverbel S.A.

DICARLO, *Judge:* The National Association of Mirror Manufacturers (NAMM) moves under Rule 56.1 of the Rules of this Court for judgment on the agency record to contest the final determinations of the United States International Trade Commission (Commission) that an industry in the United States is not materially injured or threatened with material injury by reason of less than fair value imports in *Certain Unfinished Mirrors from the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom,* Inv. Nos. 731–TA–321 through 325 (Final), USITC Pub. 1938 (Jan. 1987), and *Certain UnfinishedMirrors from Belgium,* Inv. No. 731–TA–320 (Final), USITC Pub. 1957 (Mar. 1987). This Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(A)(i) and (B)(ii) (Supp. IV 1986) and 28 U.S.C. § 1581(c) (1982). The Courts finds the Commission's determinations to be based on substantial evidence in the administrative record as a whole and according to law. The Court also finds that the Commission's determinations did not rely upon the additional views of two Commissioners on the issue of causation which the Commission did not reach after finding no material injury or threat of material injury to the domestic industry.

Background

NAMM filed petitions with Commerce and the Commission alleging that a United States industry was materially injured or threatened with material injury by reason of less than fair value imports of unfinished mirrors in stock sheet and lehr end sizes from Belgium, the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom. The Commission defined the product as unfinished mirrors, 15 square feet or more in reflecting area, provided for in item 544.54 of the Tariff Schedules of the United States, which have not been subjected to any finishing operations such as beveling, etching, edging, or framing. Mirrors subject to investigation are produced in a limited number of standard sizes and are frequently used in large projects such as hotel lobbies. USITC Pub. 1938 at 5.

Commerce found that unfinished mirrors imported from the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom were being sold at less than fair value. 51 Fed. Reg. 43,403–11 (Dec. 2, 1986). The Commission determined by a 4–1 vote that a United States industry was not materially injured or threatened with material injury, and that the establishment of a domestic industry was not materially retarded, by reason of unfinished glass mirrors imported from these countries. *Certain Unfinished Mirrors From the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom,* 52 Fed. Reg. 2459 (Jan. 22, 1987); USITC Pub. 1938 at 1.

Commerce later found that unfinished mirrors imported from Belgium were being sold in the United States at less than fair value. 52 Fed. Reg. 3156 (Feb. 2, 1987). The Commission determined by a 5–0 vote that a domestic industry was not materially injured or threatened with material injury, and that the establishment of a domestic industry was not materially retarded, by reason of the Belgian dumping. *Certain Unfinished Mirrors From Belgium,* 52 Fed. Reg. 8656 (Mar. 19, 1987); USITC Pub. 1957 at 1.

The Commission based its 4–1 and 5–0 determinations on a preponderance of positive indicators of the domestic industry's performance. The Commission's findings on the domestic industry's condition is virtually identical in both determinations because they are based on an identical record. The Commission's analysis on the threat of material injury is, however, different in each determination.

Discussion

In reviewing final negative determinations in antidumping duty investigations, the Court will hold unlawful those determinations of the Commission found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Judicial review of a Commission determina-

tion for substantial evidence is a limited standard of review. *American Permac, Inc.* v. *United States,* 831 F.2d 269, 273 (Fed. Cir. 1987), *cert. dismissed,* 108 S. Ct. 1067 (1988); *Matsushita Elec. Indus. Co.* v. *United States,* 3 Fed. Cir. (T) 44, 45, 750 F.2d 927, 936 (1984). Under the substantial evidence standard for review, the Court will affirm the Commission's findings if they are supported in the record by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists,* 476 U.S. 447, 454 (1986); *Surface Technology, Inc.* v. *United States Int'l Trade Comm'n,* 801 F.2d 3 1336, 1340 (1986); *Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1562 (1984). Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's findings from being supported by substantial evidence. *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966); *Corning Glass Works* v. *United States Int'l Trade Comm'n,* 4 Fed Cir. (T) 118, 123, 799 F.2d 1559, 1566 (1986); *Atlantic Sugar,* 2 Fed. Cir. (T) at 136, 744 F.2d at 1562.

To prevail under the substantial evidence standard, a plaintiff must show either that the Commission has made errors of law or that the Commission's factual findings are not supported by substantial evidence. It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence. *Maine Potato Council* v. *United States,* 9 CIT 460, 463, 617 F. Supp. 1088, 1091 (1985); S. Rep. 249, 96th Cong., 1st Sess. 74–75, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 460. It is not this Court's function to decide that, were it the Commission, it would have made another decision on the basis of the evidence. *Matsushita Elec. Indus. Co.,* 3 Fed. Cir. (T) at 54, 750 F.2d at 936. However, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. *Universal Camera Corp.* v. *National Labor Relations Bd.,* 340 U.S. 474, 488 (1951); *Alberta Pork Producers' Marketing Bd.* v. *United States,* 11 CIT ——, 669 F. Supp. 445, 463 (1987).

A. *The Material Injury Determinations*

NAMM contends both determinations that a domestic industry was not materially injured are invalid because they are not supported by substantial evidence on the record as a whole.

The Commission is directed to make final determinations of whether an industry in the United States is materially injured or threatened with material injury. 19 U.S.C. § 1673d(b)(1)(A) (1982). Congress defined "material injury" as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982). *See also* S. Rep. No. 1298, 93d Cong., 2d Sess. 180 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7317 ("Injury must

be a harm which is more than frivolous, inconsequential, insignificant, or immaterial").

The antidumping law is not punitive in nature, but is remedial and designed to protect industries in the United States from sales of imported merchandise at less than fair value which either caused or threatened to cause material injury. *Badger-Powhatan* v. *United States*, 9 CIT 213, 216–17, 608 F. Supp. 653, 656 (1985). As part of its injury determination the Commission considers the impact of imports on domestic producers of like products. 19 U.S.C. § 1677(7)(B)(iii) (1982); 19 C.F.R. § 207.26(a)(3) (1988). In examining the impact of less than fair value imports on a domestic industry, the Commission

> shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices, and
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

19 U.S.C. § 1677(7)(C)(iii) (1982); 19 C.F.R. § 207.26(b)(3) (1988). The Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation. *Alberta Pork Producers' Marketing Bd.*, 11 CIT at ——, 669 F. Supp. at 461. Neither the presence nor the absence of any factor listed in the statute is decisive with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the Commission to decide. S. Rep. No. 249, 96th Cong., 1st Sess. 88, *reprinted in* 1979 U.S. Code Cong. & Admin. News 474; *see also* H.R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979); 19 C.F.R. § 207.27 (1988).

In considering whether the domestic unfinished mirror industry was suffering material injury, the Commission found growth in many indicators of the domestic industry's performance. As consumption rose during the period of investigation, two new firms entered the market, one existing firm installed a more efficient silvering line, and other existing firms expanded. USITC Pub. 1938 at 6, A–8–10; USITC Pub. 1957 at 6. Employment increased and wages rose. USITC Pub. 1938 at 7; USITC Pub. 1957 at 6. Costs increased and profits decreased as the industry expanded, but the industry as a whole remained profitable. USITC Pub. 1938 at 7; USITC Pub. 1957 at 6.

The Commission found that domestic consumption, capacity, and production all rose during the period of investigation. USITC Pub. 1938 at 7; USITC Pub. 1957 at 6–7. The Commission also found that

the entrance of two new producers and improvements by existing firms increased the industry's capacity and upgraded production facilities. USITC Pub. 1938 at 6, 9; USITC Pub. 1957 at 6, 8. These findings are supported by evidence that domestic production increased 13.4 percent between 1983 and 1985 and increased again between January-June 1985 and January-June 1986. USITC Pub. 1938 at A-10 (Table 4). There is also evidence that domestic production capacity increased by 27.0 percent between 1983 and 1985 and by 3.0 percent during the interim period. USITC Pub. 1938 at 7, A-10. Productivity of domestic manufacturers, measured by output per hour, increased by over 10.0 percent between 1983 and 1985 and again increased by over 2.0 percent during the interim period. USITC Pub. 1938 at A-14-15.

Domestic capacity utilization rates declined from 52.5 percent to 47.0 percent between 1983 and 1985, and declined from 48.5 to 47.3 percent during the interim period. The Commission found that capacity utilization fell only because the increase in capacity exceeded the overall increases in production. USITC Pub. 1938 at 7; USITC Pub. 1957 at 7. There is evidence that but for the 27.0 percent increase in capacity between 1983 and 1985, capacity utilization would have increased from 52.5 percent in 1983 to 59.6 percent in 1985. USITC Pub. 1938 at A-10.

The Commission found that the volume and total value of domestic shipments to the domestic market rose from 1983 to 1985 and declined only slightly in the interim period of January to June, 1986. USITC Pub. 1938 at 7; USITC Pub. 1957 at 7. This finding is supported by evidence that the quantity of total domestic shipments increased by 11.5 percent. between 1983 and 1985, and that open market shipments (i.e. total shipments less intra-company shipments) increased by 15.9 percent between 1983 and 1985. USITC Pub. 1938 at A-12 (Table 6). Total shipments also increased during the interim period. *Id.* The Commission explained that total shipments declined in volume from 1984 to 1985 despite increases in open market shipments because intracompany shipments fell off during this period. USITC Pub. 1938 at 7, A-11-12; USITC Pub. 1957 at 7.

The Commission found that domestic inventory levels declined from 1983 to 1985 and remained stable during the interim period. USITC Pub. 1938 at 7; USITC Pub. 1957 at 7. This is supported by evidence that domestic inventories decreased by 9.0 percent between 1983 and 1985, and that the ratio of inventories to total shipments declined by 20.0 percent from 6.0 percent in 1983 to 4.8 percent in 1985. USITC Pub. 1938 at 7, A-13 (Table 8); USITC Pub. 1957 at 7.

For employment the Commission found increases in the average number of workers, the number of hours worked, hourly wages paid, total hourly compensation and output per hour. USITC Pub. 1938 at 8; USITC Pub. 1957 at 7. Specifically, the number of produc-

tion and related workers of unfinished mirrors increased by 6.0 percent between 1983 and 1985 and increased by over 7.0 percent during the interim 1986 period. USITC Pub. 1938 at A-14-15. The number of hours worked increased by 9.0 percent between 1983 and 1985 and increased again during the interim period. *Id.* Hourly wages paid to production workers increased by 16.0 percent between 1985, and increased an additional 12.0 percent during the interim period. *Id.* Total hourly compensation increased by 19.0 percent between 1983 and 1985, and increased an additional 9.0 percent during the interim period. *Id.*

The Commission found domestic producer sales of unfinished mirrors to have increased in 1984 and continued to increase gradually for the balance of the period of the investigation. USITC Pub. 1938 at 8, A-19 (Table 13); USITC Pub. 1957 at 7-8. The Commission also found that operating income apparently rose in 1984 but dropped in 1985, the year in which the industry's general, selling, and administrative (GS&A), labor, and interest costs rose substantially to reflect industry expansion. USITC Pub. 1938 at 8; USITC Pub. 1957 at 8. As a share of net sales, both the cost of goods sold and GS&A increased in 1984-85. USITC Pub. 1938 at 8; USITC Pub. 1957 at 8. While the GS&A/net sales ratio declined slightly in the interim period, the cost of goods sold/net sales ratio continued to rise. USITC Pub. 1938 at 8, A-19; USITC Pub. 1957 at 8. Capital expenditures and investment both rose during the period of investigation, with capital expenditures posting a particularly sharp rise in 1985. USITC Pub. 1938 at 9; USITC Pub. 1957 at 8.

Based on the above factors, the Commission determined that the domestic industry was not experiencing material injury. USITC Pub. 1938 at 9; USITC Pub. 1957 at 8-9. NAMM asserts the determinations are unlawful because the Commission failed to reach affirmative injury determinations after a number of domestic producers testified that a major proportion of the domestic industry suffered material injury.

The Court finds the Commission did not err in choosing to rely on financial data rather than the domestic industry's testimony. The Court also finds the Commission's determinations that a domestic industry was not materially injured are according to law and supported by substantial evidence, including evidence of increased capacity, increased production, increased shipments, increased market demand, increased net sales, increased employment, and the entrance of new producers into the United States industry, as well as further evidence that imports were either decreasing or rising only slowly, foreign producers were generally operating at high levels of capacity and therefore had little unused capacity to increase exports to the United States, importers did not hold inventory, and domestic prices were rising or steady.

NAMM concedes the domestic mirror market was in a period of economic recovery when it petitioned for relief under the trade

laws. Plaintiff's Brief at 9. NAMM contends, however, that the Commission's determinations are contrary to law because they create an "absurd result" that denies relief to an industry when it is in a period of recovery.

Contrary to NAMM's broad implication that the result in this case creates a general rule that a domestic industry cannot obtain relief when it is in a period of recovery, the fact that an industry has been lifted out of a recession does not automatically trigger a conclusion that foreign imports are not adversely affecting the domestic market because an industry's economic recovery can also be stymied by low-priced imports which expand their share of the recovering market and create artificially low prices. *USX Corp.* v. *United States,* 11 CIT ——, 655 F. Supp. 487, 490 (1987). Nonetheless, when the statutory factors which the Commission considers indicate that the domestic industry is healthy, the Commission may indeed determine that the domestic industry is not experiencing or facing material injury. *See Badger-Powhatan* v. *United States,* 9 CIT 213, 217, 608 F. Supp. 653, 657 (1985); *American Spring Wire Corp.* v. *United States,* 8 CIT 20, 21–22, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom. Armco, Inc.* v. *United States,* 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985). The Commission has discretion to make a reasonable interpretation of the facts. *Copperweld Corp.* v. *United States,* 12 CIT ——, 682 F. Supp. 552, 577 (1988).

NAMM also claims the Commission acted contrary to law because it accepted aggregated data when NAMM had offered testimony indicating that a major portion of a United States industry was injured.

A substantially similar issue was recently addressed in *Copperweld,* 12 CIT at ——, 682 F. Supp. at 569, which noted that 19 U.S.C. § 1673d(b)(1) requires the Commission to make a final determination of whether a "domestic industry" is materially injured, and that 19 U.S.C. § 1677(4)(A) defined the domestic industry as "the domestic producers *as a whole* of the like product." *Copperweld* found that this language manifests that Congress intended the Commission to determine whether

> the domestic instry (as a whole) has experienced material injury due to the imports. This language defies the suggestion that the [Commission] must make a disaggregated analysis of material injury. Furthermore, it appears that if Congress had intended that the [Commission] analyze injury on a disaggregated basis, Congress would have made this intention explicit, as it did for example in regard to regional industries.

Copperweld, 12 CIT at ——, 682 F. Supp. at 569.

Following *Copperweld,* the Court holds that the Commission acted according to law in considering the domestic unfinished mirror industry as a whole where no allegation of regional industries was made under 19 U.S.C. § 1677(4)(C) (1982).

The Court finds that the Commission's determinations that a domestic industry in the United States was not experiencing material injury is according to law and supported by substantial evidence on the record.

B. *Threat of Material Injury*

On the question of threat of material injury by reason of imports from the Federal Republic of Germany, Japan, and the United Kingdom, the Commission majority found that producers of unfinished mirrors from those countries were operating at high rates of capacity utilization and therefore had little unused capacity available for increasing exports to the United States, and there was no information before the Commission that any of the respondents planned to increase capacity significantly. USITC Pub. 1938 at 10. The market share of imports from the five countries in the first set of investigations were either declining or not rising rapidly. *Id.* at A-31. Many imports sold for higher prices than domestic mirrors. *Id.* at 10. The Commission found that because nearly all imports are pre-ordered and shipped directly to the buyer, importers did not hold inventories. *Id.* at A-22. The Commission concluded that the domestic industry faced no threat of material injury by reason of import from the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom. *Id.* at 10.

In its negative determination on threat of material injury due to imports from Belgium, the Commission found that the Belgian producer of unfinished mirrors was operating at a high rate of capacity utilization and there was no evidence that it planned to increase production capacity significantly. USITC Pub. 1957 at 9-10, A-4; R. Doc. 124 at 130-31. (Transcript of hearing). The market share of the Belgian imports declined from 1984 to 1985. USITC Pub. 1957 at 10. Although the market share rose in the interim period, the Commission found that the increase was not rapid. *Id.* Moreover, the Belgian market share was minuscule compared with the growing market share of other imports. *Id.* at A-26. Because all imports are produced to order, the importer does not hold inventories. *Id.* at 10. Although Belgian imports undersold domestic unfinished mirrors, the Commission noted that domestic producers' prices had risen or remained stable during the period of investigation. *Id.*

Considering the small market penetration of Belgian imports, the Commission determined there was little probability that future imports would depress prices or have a suppressing effect in the domestic market. *Id.* at 10-11. The Commission thus determined that the Belgian imports did not threaten the domestic industry with material injury. *Id.* at 11.

NAMM argues the Commission's determinations that the domestic industry was not threatened with material injury are unlawful because the Commission's focus on capacity utilization ignores other

evidence as to present and potential effects of less than fair value imports.

As with the injury determination, neither the presence nor the absence of any factor listed in the statute is decisive with respect to whether an industry is threatened with material injury, and the significance to be assigned to a particular factor is for the Commission to decide. *See Maine Potato Council* v. *United States*, 9 CIT 460, 463, 617 F. Supp. 1088, 1091 (1985).

Furthermore, absent some showing to the contrary, the Commission is presumed to have considered all of the evidence in the record. *British Steel Corp.* v. *United States*, 8 CIT 86, 98, 593 F. Supp. 405, 414 (1984); *Rhone Poulenc, S.A.* v. *United States*, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984); *Sprague Elec. Co.* v. *United States*, 2 CIT 302, 310, 529 F. Supp. 676, 682 (1981). This is especially true where the facts allegedly ignored were presented to the Commission at a open hearing. While it is an abuse of discretion for an agency to fail to consider an issue raised by the record evidence, *Timken Co.* v. *United States*, 10 CIT ——, 630 F. Supp. 1327, 1337–38 (1986), the fact that certain information is not discussed in a Commission determination does not establish that the Commission failed to consider that information because the Commission is not obligated to address each and every argument advanced by a party to an investigation. *Empire Plow Co.* v. *United States*, 11 CIT ——, 675 F. Supp. 1348, 1354 (1987); *British Steel Corp.*, 8 CIT at 98, 593 F. Supp. at 414. Congress did not mandate the Commission to discuss every facet of its investigation, but only "material issues of law or fact." *Jeannette Sheet Glass Corp.* v. *United States*, 9 CIT 154, 161, 607 F. Supp. 123, 130 (1985), *appeal dismissed*, 803 F.2d 1576 (Fed. Cir. 1986), *vacated in part*, 11 CIT ——, 654 F. Supp. 179 (1987). *See also* H.R. Rep. 153, 96th Cong., 1st Sess. 27 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 665, 685. When a specific issue is material to the Commission's determination, "then of course the Commission must state its findings of fact and conclusions of law on that aspect of its investigations." *Jeannette Sheet*, 9 CIT at 162, 607 F. Supp. at 130.

The Court finds the Commission's determinations on the threat of material injury to be supported by substantial evidence on the record as a whole and according to law.

C. *Effect of Commissioners' Additional Views*

NAMM's remaining issues concern the legal effect of two Commissioner's additional views made for the sake of argument to state that even if the domestic industry was injured it was not "by reason of" the European and Japanese imports.

After reaching negative determinations under 19 U.S.C. § 1673d(b)(1) (1982) that a United States industry was not materially injured or threatened with material injury, the Commission did not reach the issue of causation in either of the two determinations.

See Badger-Powhatan v. *United States,* 9 CIT 213, 217, 608 F. Supp. 653, 657 (1985); *American Spring Wire Corp.* v. *United States,* 8 CIT 20, 21–22, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom. Armco, Inc.* v. *United States,* 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985).

Having found the 4–1 and 5–0 determinations that no industry in the United States is materially injured or threatened with material injury to be supported by substantial evidence and according to law, the Court does not reach plaintiffs' arguments concerning the validity of these additional views on causation. A defect in a Commissioner's additional views generally does not affect the viability of the majority determination where the proper number of Commissioners have participated and the allegedly defective views form no part of the majority determination. *See Rhone Poulenc, S.A.* v. *United States,* 8 CIT 47, 48 n.4, 592 F. Supp. 1318, 1320 n.4 (1984).

Conclusion

The Commission's determinations that a domestic industry was not materially injured or threatened with material injury by reason of dumped imports of unfinished mirrors from Belgium, the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom are according to law and supported by substantial evidence on the record as a whole, including evidence of increased capacity, increased production, increased shipments, increased market demand, increased net sales, increased employment, and the entrance of new producers into the United States industry, as well as further evidence that imports were either decreasing or rising only slowly, foreign producers were generally operating at high levels of capacity and therefore had little unused capacity to increase exports to the United States, importers did not hold inventory, and domestic prices were rising or steady. The individual additional views that even if the industry was injured, it was not by reason of the less than fair value imports, do not affect the validity of the majority's determinations that there is no material injury or threat of material injury to a domestic industry.

(Slip Op. 88–114)

Former Employees of Tyco Toys, Inc., plaintiff *v.* William E. Brock, Secretary of Labor, defendant

Court No. 87–09–00945

[Remanded.]

(Decided August 26, 1988)

International Union, UAW (*Jordan Rossen, Leonard R. Page* and *Richard W. McHugh*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff*), Civil Division, United States Department of Justice, for defendant.

Opinion

Restani, *Judge:* This is an action challenging the Secretary of Labor's denial of trade adjustment assistance to a group of employees. The basis for eligibility for such assistance is found at 19 U.S.C. § 2272[1] (1982 & Supp. IV 1986). In this case, the Secretary of Labor concluded that the decrease in employment, sales and production experienced at Schaper Manufacturing Company's (Schaper) Lakeville, Minnesota plant and warehouse and its Plymouth, Minnesota offices were not caused by increases in imported toys, and therefore determined that plaintiffs did not meet the statutory criteria for trade adjustment assistance.

Schaper was a division of Kusan, Inc. of Nashville, Tennessee. The Lakeville plant produced "Cosom" sport toys and games. Schaper also imported products for which it made accessories at the Lakeville plant. The findings of the investigation included the following: (1) that the Lakeville plant had been underutilized since it was built in 1973, (2) that between 1980 and 1985 employment at the Lakeville facilities increased to handle packaging and manufacture of accessories for an imported toy, "Stompers," (3) that as is common for toys, Stompers eventually decreased in popularity, and (4) that sales and production declined as a result. In 1986 Kusan, Inc. sold Schaper to Tyco Industries of Moorestown, New Jersey and Tyco allegedly moved production and handling of the Cosom and Stompers lines to New Jersey and Massachusetts.

Plaintiff claims that the Secretary's investigation was inadequate and that the resulting decision is not based on substantial evidence. First, plaintiff objects that no investigation was performed to determine if imports, in part, caused the plant closing, particularly, that no customer survey was performed to determine whether Schaper's customers began buying imported toys as opposed to domestically manufactured toys. Defendant contends that most of Schaper's products in the year immediately prior to closing were imported, that vital Stompers business actually was lost to domestic competition, and that Schaper's remaining domestic manufacturing did not cease, it merely moved elsewhere within the United States.

The problem with these conclusions is that they are based on information provided by one source who is without complete personal

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[1] 19 U.S.C. § 2272 reads in relevant part as follows:

§ 2272. Group eligibility requirements

The Secretary shall certify a group of workers * * * as eligible to apply for adjustment assistance under this part if he determines—

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partiality separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

For purposes of paragraph (3), the term "contributed importantly" means a cause which is important but not necessarily more important than any other cause.

knowledge of the facts and there is no documentary evidence to back the conclusions up.[2] The Secretary never tried to get business records from the purchasing company and it never obtained the purchaser's statement as to why it closed the plant and what happened to production.

This investigation was put on a fast track and, as indicated, only one person without direct knowledge of all the information purportedly relied on, was interviewed. That person also made comments, found at pp. 33, 39 and 42 of the confidential record which indicate a certain bias against provision of trade adjustment funds to the claimants. This provides an additional reason why the investigators should have sought some corroboration of the statements made. Furthermore, petitioning workers were unable to respond to the statements relied on because no records were sought. This also means any relevant records are unavailable for review here.[3]

The import statistics gathered by the Secretary show rising imports and there seems to be a general consensus that lower labor costs overseas have led to attractively priced imported toys replacing some domestically manufactured toys. Contrary to the seeming thrust of the findings, this company is not a mere importer of foreign goods. It manufactured some products or parts of products domestically. An issue to be examined is whether its customers turned to imported products or whether the corporate purchaser foreign sourced the domestically produced items. The fact that one cause of the plant's closing is unrelated to increased imports should not be determinative; an investigation should be conducted so that the Secretary has evidence on which to base a decision that increased imports did or did not contribute importantly to the separations. Statements from the one source that are inconsistent, uncorroborated, not entirely based on personal knowledge, and possibly biased do not constitute substantial evidence.

Although the Secretary has discretion to do investigations in many different ways, he has failed to do an adequate investigation here. This matter is remanded for the Secretary to seek relevant information from Tyco Toys and to perform a customer survey if possible. The Secretary may take whatever other steps he deems necessary to reach substantiated conclusions.

[2] The one source does not claim personal knowledge of what transfer of production occurred domestically.

[3] The same source stated that the records would be difficult to obtain. As indicated, the Secretary does not claim that he tried to get them.

(Slip Op. 88–115)

ROBERT I. HUTSON, PLAINTIFF *v.* UNITED STATES, U.S. CUSTOMS SERVICE, THE HONORABLE WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, AND THE HONORABLE JOHN V. LINDE, DISTRICT DIRECTOR OF CUSTOMS, BOSTON, DEFENDANTS

Court No. 87–09–00962

Before NICHOLAS TSOUCALAS, *Judge.*

[Plaintiff's motion for judgment on the agency record pursuant to USCIT R. 56.1(a) is hereby denied; judgment entered in favor of defendants; action is dismissed.]

(Decided August 26 1988)

Sullivan & Lynch (*Herbert J. Lynch*) for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*James A. Curley) for defendants.*

OPINION

TSOUCALAS, *Judge:* Plaintiff, Robert I. Hutson, filed this action to contest the revocation of his privilege of access to Customs Security Access Zones at Logan International Airport, Boston, Massachusetts ("Logan Airport"). John V. Linde, the District Director of Customs, Boston District, determined that continuation of plaintiff's security zone access privileges would endanger the revenue or security of the area within the meaning of 19 C.F.R. 6.12a(j)(1)(iv).[1]

The action is now before the Court on plaintiff's motion for judgment on the administrative record, pursuant to Rule 56.1(a) of the Rules of this Court.

BACKGROUND

In March, 1986, the United States Customs Service ("Customs") adopted regulations governing access to secured areas at airports throughout the United States. *See* 19 C.F.R. § 6.12a; Tr. at 38. Pursuant to these regulations, the plaintiff, an aircraft mechanic for Trans World Airlines, filed for and received an identification card allowing him unescorted access to the secured areas at Logan Airport. Such access allowed plaintiff to enter and exit the Customs security area without being subjected to a Customs examination. Administrative Record, Hearing Transcript at 8, 30 (hereinafter "Tr. at ——.").

On October 3, 1986, the District Director of Customs revoked plaintiff's access privileges, thereby exercising his discretionary powers under 19 C.F.R. § 6.12a(e)(1), upon finding that plaintiff had

[1] 19 C.F.R. § 6.12a(j)(1), provides, in pertinent part, that:

An approved identification card, strip or seal may be removed from an employee by any Customs officer designated by the district director. In addition, the district director may revoke or suspend access to the Customs security area for any of the following reasons:

(iv) The continuation of privileges would, in the judgment of the district director, endanger the revenue or security of the area;

violated 19 U.S.C. § 1592 (1982).[2] Tr. at 67, 76. This violation was the sole reason for revoking plaintiff's access privileges.

The conduct which led to the revocation was revealed in a hearing held at plaintiff's request for reconsideration. Plaintiff arrived at Logan International Airport from a trip to Europe on November 25, 1985, and was subjected to a Customs examination by a Customs Inspector.[3] Tr. at 7–8. Plaintiff, in a Customs Declaration presented to the inspector, claimed that he was importing platic and vinyl tote bags valued at $700, along with other merchandise. Administrative Record, Agency Exhibits 1, 2 (hereinafter "AX ——."). Plaintiff then told the Customs Inspector that the importations were noncommercial and not for resale in the United States. Tr. at 10. He also told the Customs Inspector that he had only forty bags and no receipts. *Id.*

Upon further examination, however, the Customs Inspector discovered that there were, in fact, forty-nine (not forty) bags, and that the bags were counterfeit copies of Louis Vuitton luggage.[4] Tr. at 12–13, 16. The Customs Inspector also discovered eleven undeclared Gucci wallets and an undeclared key chain. Tr. at 14; AX 6. In plaintiff's handbag, the inspector also found a receipt and another Customs Declaration that was virtually identical to the Customs Declaration submitted, except that the value of the bags was stated as $300 and not $700 as the declaration he submitted showed. Tr. at 10–11; AX 2, 3.

The plaintiff did not accurately declare the value of the merchandise on his Customs Declaration Form. AX 1–4, 13. The value of the bags was actully closer to $1,500 than $700. Tr. at 13; AX 4. He also admitted misrepresenting to the inspector that the goods were not for resale when he had actually intended to resell them. Tr. at 13–14; AX 14 at Findings of Fact of the Hearing Examiner.

U.S. Customs Import Specialist James Lynch valued the bags at $8,700 foreign value and $12,375 domestic value; the wallets at $1,900 foreign value and $2,750 domestic value; and the key chain at $35 foreign value and $50 domestic value. AX 6, 11; Tr. at 32–33.

The hearing examiner recommended that the revocation be upheld stating: "I find the District Director's [Mr. Linde's] decision to revoke [plaintiff's] privilege of access to Customs security areas at Logan International Airport to be a correct and supportable decision under the regulations." Administrative Record, Attachment to December 29, 1986 letter to Joel Mish at 2. On January 27, 1987 the

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[2] § 1592. Penalties for fraud, gross negligence, and negligence

(a) Prohibition.—

(1) General rule.—Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document, written or oral statement, or act which is material and false, or
(ii) any omission which is material

* * * * * * *

[3] The events which led to the § 1592 violation occurred before plaintiff had secured an access permit.
[4] It has been stipulated that the bags were counterfeit. AX 13.

hearing examiner forwarded his decision to the Regional Commissioner who ln turn sent it to the Assistant Commissioner of Customs, Office of Inspection and Control, Washington, D.C., who affirmed the revocation. *See Plaintiff's Brief in Support of Plaintiff's Motion for Judgment on Review of Administrative Determination upon an Agency Record* at 2 (hereinafter "*Plaintiff's Brief* at ——.").

Plaintiff maintains that the determination to revoke his access permit should be overturned, irrespective of his breach of § 1592, on the following grounds outlined in 5 U.S.C. § 706 (1982): (1) that the decision was not supported by substantial evidence in the record; and (2) that the agency action was arbitrary, capricious, an abuse of discretion and not in accordance with law.[5]

DISCUSSION

The question before this Court is whether Customs properly revoked plaintiff's access permit solely on the grounds of the § 1592 violation.[6] The District Director's revocation decision must be supported by substantial evidence and be in accordance with law. 5 U.S.C. § 706(2)(E) (1982); *see Baltimore Security Warehouse Co.* v. *United States,* § CIT 641, 644–45 (1985). This standard requires the Court to uphold the agency action as long as there is such evidence in the record as a reasonable mind would accept to support the conclusion reached. *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938); *see also American Spring Wire Corp.* v. *United States,* 8 CIT 20, 21, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom. Armco, Inc.* v. *United States,* 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985).

Plaintiff claims that his transgression of § 1592 "by itself, does not represent conduct that suggests that the violator presents a threat to the security of the Customs Security Access area or endangers the revenue" under 19 C.F.R. § 6.12a. *Plaintiff's Brief* at 16. In support of this argument, plaintiff claims that when he violated § 1592, he was found to be only "grossly negligent," which, under the regulations is defined as being "without *intent* to defraud the revenue or violate the laws of the United States." [7] 19 C.F.R. § 171, app. B(B)(2) (emphasis added). In other words, plaintiff contends that his conduct lacked the requisite intent whlch would justify the District Director's decision to revoke his privileges under the regulations. Therefore, plaintiff concludes, "[i]t is difficult to discern how an act which was done without intent to defraud the revenue or violate the laws of the United States makes [plaintiff] a danger to

[5] Plaintiff also claimed that the Customs Regulations, 19 C.F.R. § 6.12a, are in excess of statutory jurisdiction, authority, or limitation, or short of statutory right. However, the Court finds this claim to be wholly without merit.

[6] Customs admitted to improperly basing its decision to revoke plaintiff's permit on "criminal activity which is a matter of record." Administrative Record, Joint Exhibit 1; Tr. at 76. The basis for discontinuing plaintiff's access privileges, and the only issue here, is whether the conduct which violated § 1592 is a sufficient justification for terminating plaintiff's privilege of access.

[7] The definition of gross negligence in the Customs Regulations is as follows:

> an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference or disregard for the offender's obligations under the statute, but without intent to defraud the revenue or violate the laws of the United States.

19 C.F.R § 171, app. B(B)(2); *see also* Tr. at 53–54.

the revenue or the security of the airport area." *Plaintiff's Brief* at 17.

This Court must sustain the agency action if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *American Spring Wire,* § CIT at 21, 590 F. Supp. at 1276 (quoting *Universal Camara Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951)). The District Director of Customs has the responsibility of assuring that the Government receives its proper share of revenue and that the Customs security area at the airport is not endangered. Under the regulations, "[a]n approved identification card, strip, or seal shall not be issued to any person whose employment, if necessitating access to the Customs security areas will, *in the judgment of the district director,* endanger the revenue or the security of the areas." 19 C.F.R. 6.12a(e)(1) (emphasis added).

Plaintiff's argument that he acted without the requisite intent is inapposite. At the hearing, Customs introduced ample evidence that plaintiff had violated 19 U.S.C. § 1592 by misrepresenting the value and the amount of goods he had brought into the country. In fact, plaintiff has conceded the violation. Therefore, although he was found only to be grossly negligent for purposes of the statute, plaintiff unquestionably engaged in deliberate acts of misrepresentation which is precisely the type of conduct the secured area is designed to avert. As the defendants rightly emphasize, the plaintiff acted "intentionally" when he intentionally undervalued his shipment. *See Defendants' Brief in Opposition to the Plaintiff's Motion for Judgment upon the Agency Record and in Support of Defendants' Request for Judgment* at 11–12. Based on these facts, the Court finds the revocation decision pursuant to 19 C.F.R. § 6.12a to be supported by substantial evidence.

Plaintiff further maintains that the agency action was arbitrary and capricious and otherwise not in accordance with law since the violation of 19 U.S.C. § 1592 occurred on November 25, 1985 and was allegedly known by the District Director in March 1986 when he approved plaintiff's application for the permit. Plaintiff argues that since the District Director initially granted the permit to plaintiff sometime after the § 1592 violation, he must have found plaintiff not to be a danger to the revenue or security of the area. Therefore, plaintiff continues, the revocation of his permit was arbitrary, capricious, and not in accordance with law.

Under the arbitrary and capricious standard, this Court's scope of review is a narrow one. *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285–86 (1974). The Court, to uphold the agency action, must inquire whether the rationale of the agency is both discernible and defensible. *Id.; Trans-Pacific Freight Conference of Japan/Korea* v. *Federal Maritime Commission,* 650 F.2d 1235, 1251 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 984 (1981). In so doing, the Court may not substitute its judgment for that of the agency, but need only assure itself the decision

was rational and based on consideration of relevant factors. *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971).

At the administrative hearing held November 6, 1986, the District Director unambiguously stated that he was unaware of plaintiff's § 1592 violation at the time the permit was issued; it was brought to his attention by the Assistant District Director for Inspection and Control while reviewing plaintiff's application.[8] Tr. at 27–31. The Court, therefore, finds it reasonable that Customs may want to deny an individual privileged access to secured areas when that person has attempted to bring goods into this country without either declaring their correct value or their existence at all, and has admittedly made material misrepresentations to that effect.

Based on a thorough review of the record, the Court is of the opinion that the action taken by Customs was supported by substantial evidence, was in accordance with law, and was not arbitrary and capricious. The severity of the punishment imposed was within the parameters provided by the applicable statute and regulations. When a penalty chosen by an agency is within the range of sanctions provided by applicable disciplinary regulations, the severity of the sanction imposed is within the discretion of the agency. *Ricci* v. *United States,* 507 F.2d 1390, 1393 n.3 (1974) (citing *De Nigris* v. *United States,* 169 Ct. Cl. 619, 625 (1965); *Grover* v. *United States,* 200 Ct. Cl. 337, 353 (1973)). In view of the foregoing, the Court will not substitute its judgment for that of the agency.

Conclusion

There being no procedural irregularities in the agency's action, no abuse of discretion, and substantial evidence on the record to support the decision by Customs, plaintiff's motion must be denied and judgment entered in favor of defendants.

[8] The District Director, after becoming aware of the plaintiff's violation of 19 U.S.C. § 1592, decided that the continuation of privileges on behalf of plaintiff would, in his judgment, endanger the revenue or security of the area.

Index

Customs Bulletin and Decisions
Vol. 22, No. 39, September 28, 1988

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

Slip Opinions

*U.S. G.P.O. 1988-201-727:80007